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Supreme Court of the United States.

THE PEOPLES NATIONAL BANK OF LYNCHBURG,
APPELLANT,

v.

MORTON MARYE, AUDITOR OF PUBLIC ACCOUNTS
OF THE STATE OF VIRGINIA.

Note for Appellant on Demurrer.

R. F. HILL CO., LYNCHBURG, VA.

Supreme Court of the United States.

THE PEOPLES NATIONAL BANK OF LYNCHBURG,
APPELLANT,

v.

MORTON MARYE, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF VIRGINIA.

Note for Appellant on Demurrer.

The four national banks of the city of Lynchburg, by proceedings in these causes, are resisting the payment of certain taxes assessed against their stockholders, and demanded of them under and by virtue of the powers vested, respectively, in the commissioner of the revenue for said city, and the auditor of the State of Virginia, by the three Acts of Assembly, copies of which are hereto attached, for your Honors' convenience, marked, respectively, "A, B and C." These acts were approved, the first, on the 5th of March, 1890, and the other two on the 3d of March, 1896.

This effort to resist is not the result of any unwillingness on the part of the complainants to bear their proportion of the burdens resting on the citizens of the Commonwealth, but proceeds from that high sense of duty obligatory upon every citizen or subject to protest against and to resist the taking of his property by the exercise of arbitary power on the part of the government.

Except in times of great political excitement, the life and liberty of the citizen is seldom endangered by unjust or unconstitutional laws, but the danger to his *property*, especially corporate, from improper legislation has survived the great struggles to secure personal liberty.

The right to tax is a very high exercise of the right of

eminent domain, and while it is essential for the support and maintenance of the government, it must ever be exercised under constitutional limitations, and the law which grants the power must be construed with the utmost strictness. In no other way can taxation be prevented from becoming an instrument of injustice. Chief Justice Marshall has well said that "the power to tax is the power to ruin."

For this reason it becomes the duty of the citizen, when called upon to pay a tax, to see that it is properly assessed and is just in its imposition.

To this end it is that these suits were brought.

The national banking system was established early in the war, when the nation was in the throes of its great civil struggle. The able minds that devised the scheme had in view the increase of the volume of the currency and the securing purchasers for United States bonds, a great amount of which the government was then issuing. The patrons of the system well understood that any *national* banking system would meet with serious opposition, and would have to overcome strong prejudices, hence the law which gave being to the banks had to protect them against unfriendly legislation on the part of the States, especially that species of legislation which imposed taxes upon their capital or their shareholders.

The first limitation upon this taxing power was incorporated into the law which gave national banks existence. It provided that the State should not impose upon national banks, or the stock of national banks, any tax greater than that imposed upon other banks, or the stock of other banks, not national. This, however, was not found to be a limitation sufficiently broad in its scope, and therefore in 1868, by section 5219 of the Revised Statutes, it was provided that *no State should impose a tax upon the stock of national banks at a "greater rate than that assessed on other moneyed capital in the hands of individual citizens of the State."* It also, for the purpose of giving some compensative privilege to the State, provided that shares owned by non-residents should be taxed only where the bank was situated.

It is under the first of these limitations that the banks now seek protection in part from the illegal tax demanded of them by the State of Virginia.

With the lapse of time, a further limitation was ingrafted on the organic law of the United States. A limitation for the protection of life, liberty and property, which had its origin in Magna Charta, and which was imbedded into the common law, though not, until within the memory of the present generation, incorporated into the constitution. The short sentnce, *"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law,"* is a part of the first section of Article 14 of the Constitution of the United States. To its protection we appeal in these causes, and assert that the assessment, of which we complain, violates both its letter and its spirit.

Vouching these premises, we respectfully submit to your Honors that the acts, imposing this tax upon your complainants, are unjust, illegal, unconstitutional and void, for the following reasons:

I.

Because they are in contravention of section 5219 of the Revised Statutes, in that they undertake to impose a tax upon the stock of your complainants in the hands of its holders, which is greater than that imposed upon other moneyed capital in the hands of private citizens of the State.

We hold that these provisions of the national banking law have been violated by these laws in two modes: First, by not permitting the holder of such stock to deduct his indebtedness from its assessed value, a privilege which is granted as to the taxes laid upon other moneyed capital in the hands of the citizen;

Second, by not permitting a deduction from the market value of the stock, the value of the real estate belonging to the bank, and in which its capital is in part invested. This privilege is

given in taxing the stock in other corporations, and a double tax is thus avoided.

Justice Matthews, in *Mercantile Bank* v. *New York*, 121 U. S., p. 160, in speaking of the valuation of the shares of stock, says:

> "From this are to be deducted, of course, the real estate of the corporation otherwise taxed."

See on this subject *Pelton* v. *National Bank*, 101 U. S. 146; *Van Allen* v. *Assessors*, 3 Wall. 581.

Commissioner of Rice Co. v. *Citizens National Bank*, 23 Minn. 280:

> "Where shares of stock are assessed at their actual cash value, without any deduction for the real estate owned by the association, the real estate should not be taxed *eo nomine*."

This assessment of real estate is in violation of the Constitution of the United States in that it denies the equal protection of the law to national banks and their stockholders, as every other corporation is allowed to deduct its real estate before its capital is taxed, and no individual is oppressed with this system of taxation. See *County of Santa Clara* v. *Southern Pacific Railway*, 18 Federal Reporter, 410. It also violates the Constitution of Virginia, which requires that taxation shall be equal and uniform. How can taxation be equal and uniform when banks alone are taxed twice on their real estate, the bank first paying the tax on its real estate, and then the shareholder paying it, as it constitutes a part of the market value of their stock?

That your Honors may fully appreciate the objections made, we deem it wise to give an abstract for easy reference of the acts themselves.

The first statute complained of is the 17th section of the Act approved March 5, 1890, marked "A," and hereafter set forth in full.

That act provides:

> (1) "No tax shall be assessed upon the *capital* of any bank or banking association, organized under the authority of this State or of the United States."

This provision is in the very language of the first part of sec. 5219 of the Revised Statute and of the decisions of the Supreme Court of the United States, where it has been held that no such tax can be placed upon the capital of national banks *in solido*.

> (2) "But the stockholders in such bank or banking associations shall be assessed and taxed on the *market value* of their shares of stock therein, at the same rate as is assessed upon other moneyed capital in the hands of individuals residing in this State."

This is but enacting into the State law the provisions of the National Banking Act. Having made this declaration of established law, the act proceeds forthwith to violate the very law it starts out by asserting as a fixed principle.

> (3) "It shall be the duty of each commissioner of the revenue annually *during the month of May* to report to the auditor of public accounts the name of each bank or banking association doing business in his district, and the names of the officers thereof, *and to assess the share or shares of each stockholder therein* as of the first of February in each year."

Your Honors will perceive that under this clause it is made the duty of the commissioner of the revenue, without notice to the owner of the time or of the place of the assessment, to assess the market value of the stock. In other words, the commissioner of the revenue is required to exercise the *judicial function* of assessing the value of the stock, without notice to the holder thereof of the time and place where such judicial function will be exercised, and without any due process of law, whereby the opportunity would be given the owner to appear, to be heard, to introduce evidence, to protest, or to appeal from such judicial action.

The commissioner of the revenue who makes this assessment without notice is required to report during the month of May, to the auditor, the result of his judicial ascertainment of the amount of property of the stockholder which is to be taxed, and its value. This assessment may be wrong; the person in whose name it is assessed may not own the stock, and there may be serious other

objections to it, but the owner of the stock, the man whose money is to be taken, has no opportunity to be heard, to investigate, to except, directly or indirectly, or to appeal from this judgment which is rendered against him. No such right is granted him by the act.

> (4) "**It shall be the duty of each of such banks or banking associations further to pay into the treasury of the State the tax imposed by law upon such assessment of shares aforesaid, on or before the first day of June.**"

After this secret tribunal has rendered its judgment, without notice to the party whose property is taken, and has given a copy of it to the auditor, the bank, a part of whose capital is represented by the shares which have been assessed, is required to pay the amount of the tax levied under this assessment into the treasury of the State at Richmond. In other words, an assessment is made against the stockholder of which he is ignorant, and the bank is required to pay the tax upon the stock without notice to him, and without regard to the question whether or not the assessment was legal or just, or whether the bank has money in its possession belonging to the stockholder. The stockholder is ignored. He has not even the right to go and pay the assessment himself. It must be paid by the bank into the treasury of the State. All the machinery applicable to the collection of other taxes is disregarded, and the whole arrangement is conducted with that official secrecy, which is so surely the badge of tyranny.

That there must be some element of the strong hand in all taxation is unavoidable, but care should be taken to reduce it to the minimum. The records of legislation rarely produce a parallel to this in its harshness, its injustice, and the opportunity which it affords for a wrong being done.

> (5) "**If such tax be not paid within thirty days after the assessment of such share, the *cashier* of the bank or banking association failing to make payment, *and his sureties*, shall be liable for the same *and twenty per centum upon the amount*, to be recovered, on motion of the auditor of public accounts, in the Circuit Court for the city of Richmond upon fifteen days' notice.**"

Your Honors will doubtless be surprised upon reading this to find that such legislation exists. We do not contend that the State has not the right to use the bank as an instrument for collecting its taxes. This is done in New England and in many of the States, and has been approved by the courts, but there must be certain conditions precedent to any such use of the bank. The tax must be legal, the assessment of the tax must be by due process of law, and lastly, there must be money of the shareholder, against whom the tax is assessed, in the hands of the bank. The bank cannot legally be required to advance funds to the State for a delinquent taxpayer. Under this law of March 5th, 1900, the bank is called upon to pay this tax for the taxpayer, without regard to any of these conditions.

This provision calls upon the cashier, who has no legal right to disburse the funds of the bank except by an order of its board of directors, to pay this money, and upon his failing to do so within thirty days after the indeterminate period at which the assessment is made, he is required, out of his own means, to pay the tax thus wrongfully assessed against the stockholder, and, if he fail to do so, the tax may be recovered of him, and of the sureties on his official bond, *with twenty per centum added as a fine*, on a motion before the Circuit Court of the city of Richmond. In other words, should a cashier have some conscientious scruples about taking the money of the institution intrusted to his care and paying it out for the debt of some other party, without the order of the board of directors, he and his securities are liable not only for the sum demanded of the third party, but for a fine in addition of twenty *per centum*.

The next step taken, looking to the collection of this illegal tax, is found in the act of March 3, 1896 (Acts 1895-6, page 700), authorizing the auditor of the State to collect taxes on bank stock assessed under the act of March 5, 1890, which have not been paid (copy attached, marked "B").

That your Honors may fully understand our position, we respectfully call your attention to this act, the consideration of which is essential to the true understanding of the questions at issue.

The tax against your complainants for the years from 1891 to 1895, inclusive, were all assessed under the act of March 5, 1890. The national banks in Lynchburg declined to pay them, and then the above act, which was the first of the two passed March 3, 1896, was adopted for the purpose of creating an additional mode of enforcing the collection of said taxes, hence we proceed to analyze it as follows:

(1) It starts out with declaring that the holder of stock in banks doing business in this State shall be assessed with the tax imposed thereon by law, in the city, town or district where the bank or banking association is located.

This is but a re-enactment of the law in regard to the *situs* of bank stock for taxation. It does not particularly affect the matter in controversy.

(2) The next clause makes the tax "a first lien on the stock, no matter in whose hands it may be, and gives it priority of any lien by deed of trust, mortgage, bill of sale, or other assignment made by the owner, and gives it priority over all liens by execution, garnishment or attachment."

This is clearly *ultra vires* on the part of the legislature, which has no power to pass an act so retroactive as to abrogate existing contracts. It undertakes to create a lien not theretofore existing, which is to take priority of vested rights, existing under previous contracts or by operation of the law, between private individuals. This cannot be. The exhibits filed show various transfers of this stock, upon which this act attempts to create a lien for taxes assessed before the sales. (Record, pages 31 to 65, inclusive.)

(3) The act next provides that the auditor shall furnish the bank with a list of the stockholders who have not paid the tax, theretofore assessed, and the bank may then, if it desire, "pay to the auditor the tax assessed upon the stockholders holding its stock, provided it is made before July first, 1896." Again, *no opportunity is given the stockholder to pay his own tax* until he is sued, as he is in ignorance of the date of the assessment or its amount. It is a secret between the cashier of the bank and the auditor.

(4) Should the bank decline to avail itself of the "privilege" granted it to pay this tax, the auditor is directed to give a copy of the list of the delinquents to the attorney general, and it is made his duty to collect the amount shown to be due thereon by a motion in the Circuit Court of the city of Richmond, notice being given to the stockholder by personal service as to residents, and an order of publication as to non-residents. This is unconstitutional, as no personal judgment can be entered on order of publication as to non-residents.

If the bank does not avail itself of the *privilege* of paying the debts of other persons, so graciously extended by the legislature, the stockholder is to be sued upon the judicial ascertainment theretofore made without his knowledge. Now for the first time provision is made that notice shall be given him. But the only notice which he gets is that a judgment has been rendered theretofore against him, that is, the ascertainment of the value of his stock and the tax assessed, that there is no appeal therefrom, and that he is to show cause in a distant city why he does not pay it.

As to him the assessment is *res adjudicata,* and under this motion he can only plead *nul tiel record* or payment. It might be suggested that this notice gives the taxpayer a *day in court* and is all the *due process of law* requisite under the decisions. It might as well be said that when the halter is put around the neck of a victim condemned by a vigilance committee, he suffered after due process of law and had had his day in court.

This act, as your Honors can clearly perceive, was passed not to repeal any of the obnoxious provisions of section 17 of the law of March 5, 1890. It only undertook to create a cumulative remedy for the collection of taxes assessed under that law.

We hold that law to be illegal, unconstitutional and void. If it was, this act, now under consideration, is but an effort to create a mode of collecting taxes assessed under a void law, which cannot be done. *If the law was void, then no subsequent legislation can revivify it.* It was stillborn, and never had such an existence as would support any

species of amendment, and any effort to so amend is tainted with the same wrong and must share the same fate. In the case of *Williams* v. *The Board of Supervisors of the County of Albany,* 21 Fed. Rep. p. 99, the court quoted approvingly the declaration made by Mr. Cooley in his book on taxation, page 227, that "a validating act cannot cure the illegality of an assessment made without any notice to the person interested." This is so clear a proposition of common sense that it must be law. In this connection your Honors' attention is called very earnestly to the opinion of Wallace, J., in this case of *Williams* v. *Albany,* which was ably argued by distinguished lawyers. The opinion is one which treats this whole subject of due process of law with great ability, and reference will be made to it again under that head of this argument. In that case the court decided against the complainants, but sustained the principles for which we contend.

If the legislature had intended under the Act of March 3d, 1896, to allow the stockholders to contest the valuation made by the commissioner in former years, when the stockholders were sued by motion, it would have said so in the act.

And if the legislature had the intention of changing its policy and obeying the Constitution of the United States, under section 17, passed on the same March 3d, 1896, it would, as to future assessments, have given the stockholder the opportunity to be heard on the valuation of his stock, but new section 17 makes no effort to correct this wrong, and is only more stringent in the remedies given for the collection of taxes assessed against the stockholder by the commissioner without giving the stockholder any opportunity.

These two bills of March 3d, 1896, were not only passed on the same day, but Mr, Turpin was the patron of both bills. Both were reported from the same finance committee of the house, one known as House Bill No. 673, and the other as House Bill No. 675, as appears from copies attached to this note, and the court can take judicial notice of the journals of each house of the legislature. See Cooley on Constitutional Limitations, top page 163, 5th edition.

Such action was not the result of the two bills coming from different sources.

The taxes of 1891-2-3-4-5 were assessed under old section 17. The tax for 1896 and 1897 was assessed under new section 17. So from 1895 down the act providing for motions against stockholders who had been assessed for previous years has no effect. But an act done under an unconstitutional law never had a legal existence, and all acts done under an unconstitutional law, whether judicial or administrative, can have no effect in creating a liability, and therefore an assessment made under an unconstitutional law was, from a legal standpoint, no assessment. It never existed as an assessment. The act of the commissioner was no more than the act of any private individual. It was no more than an assessment made by some one without official authority so far as creating a legal liability against the shareholder.

A judgment entered against A without process, namely, notice to A, whereby A may have an opportunity to be heard, can never by subsequent legislation be made a valid judgment—a legal judgment. Therefore the legislature cannot make the void assessment the basis of a suit against any one. No liability against the shareholder had ever been created by the void acts of the commissioner of the revenue. A liability to the State can no more be created under a void law than a liability to an individual. Cooley on Constitutional Limitations, 5th edition, top page 224, marginal page 188, says:

> "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."

But even if this proposition had not been true, still the stock-

holders could not on the motion authorized by an act of the legislature passed long afterward, contest the valuation of this stock; the assessment being a judicial act, it was complete; the commissioner had adjudicated the valuation before the act of 1896, and there being no provision in the act of 1896 for reopening the judgment rendered by the commissioner as to the valuation, it could not have intended that the valuation should be an open question. If the legislature had intended to permit the decision of the commissioner in the valuation to be re-opened, it would have said so. The act simply gave an additional remedy for the collection of the amount of the tax which the commissioner had assessed and adjudicated against the stockholder. The act says the tax due the Commonwealth. How due the Commonwealth, if not by virtue of the adjudication of the valuation by the commissioner; and section 3 says shall proceed to collect said tax from the individual stockholder.

Because the State had the right to sue, this does not give the taxpayer in that suit the right to contest the valuation which had been adjudicated by the commissioner. Action can be brought on a judgment.

In the case of *Violett* v. *Alexandria,* the city filed a bill to subject the land to taxes. There was no question of the right of the city to file the bill. If in any suit there was the inherent right of the taxpayer to contest the valuation it would seem he had the right in a suit of equity, where defenses are not technical, but it was not held by the court that this suit by the city was due process of law, but in this suit the assessment was held void because no opportunity to contest the valuation was given by any law which existed at the time the assessment was made. The assessor's court had been held, his judgment of valuation entered, and the court adjourned without notice to the stockholder. (See *Stanley* v. *Supervisors,* 121 U. S. 550.)

In *Palmer* v. *McMahon,* 133 U. S. 665, the proceeding was to punish by imprisonment for failure to pay the tax assessed. The defense was wrongful assessment, over valuation, etc. The

court held it was a collateral attack on the assessment, and refers to *Stanley* v. *Supervisors,* 121 U. S., as authority, that a collateral attack cannot be made by the taxpayer on the assessment.

There are two classes of questions in assessing:

I. If the law gives no opportunity for contesting the valuation, the law is void, and therefore the assessment is void.

II. If certain facts are necessary under the law which gives notice to confer jurisdiction on the assessor, then the law is valid but the assessment is void, if the facts necesary to give jurisdiction to the assessor do not exist.

If, for instance, he can assess only residents of his district, then he has no jurisdiction of non-residents, and any assessment that he may make against non-residents is a void assessment, although the law under which he acted was a valid law. He has simply not obtained jurisdiction under the law.

If he can assess non-residents, who have property in his district, the existence of the property in his district gives him jurisdiction, but if he assess a non-resident who has no property, he is without jurisdiction, and the assessment is void although the law is valid. Our case belongs to class No. 1, and a valuation being a judicial act, it cannot be, as we have seen, opened up after it has once been made, and for that reason there must be a law co-temporaneous with the assessment under which an opportunity is given the taxpayer to be heard.

A tribunal to hear the stockholder, in other words, must be designated by law; neither the commissioner of the revenue nor the auditor of public accounts have any authority to hear the taxpayer unless the law confers the authority. Outside of what the law authorized them to do they are mere private citizens, and not a judicial tribunal.

It is a matter of which the court is as well informed as any one, and which appears from the exhibits filed with the bills (Record, p. 31 to 65), that the shares of stock were constantly changing ownership, and although no personal liability was imposed by section 17 upon the owner of shares, yet this act, passed years afterwards, attempts to give a right of action for a

liability which had never been personally imposed on the shareholder, and to overwhelm the stockholders with costly suits about one hundred and fifty miles from Lynchburg, in many of which suits the costs, not including counsel fees, would exceed the amount involved.

Of course the foregoing act is not a repeal by implication of section 17 of the acts of 1889-90, because there is no inconsistency in the provision of the two. On repeal by implication, *Sutherland on* Statutory Construction, section 137, p. 178, says:

> **"But a statute may have the effect to repeal a former statute, or some provision of it, though it be silent on the subject of repeal. In such cases repeal is inferred from necessity, if there be such conflict, that the old and new statutes cannot stand together."**

And in section 138, p. 179, it is said:

> **"An implied repeal results from some enactment the terms and necessary operation of which cannot be harmonized with the terms and effect of an earlier act. In other words, one must be repugnant to the other, so that both cannot be operative."**

The next act, of which we complain, and which was adopted in the attempt to cure defects in former acts, is the one amending section 17 of the act passed on the 3d of March, 1890. (See Acts of 1895-6, page 726, and exhibit "C," hereto attached.)

The legislature becoming satisfied that section 17 of the act passed March 5, 1890, was very defective, and doubtless being apprehensive that it was void, undertook to cure its defects by amending section 17, which was the section in dispute. All assessments made from 1896 to the present time, against the complainants in these causes, were made under the amended section 17, and the principles to be decided will control all assessments from 1896 to the present time. Hence it is essential that we should examine that act critically, which we will do, as we have done the other two, by a rigid analysis, to wit:

(1) The first clause merely repeats the declaration of the

former act, incorporating the law of Congress in regard to the rights of States to tax the capital of banks and the shares of stockholders, and hence it need not be further noticed.

(2) The second clause requires the bank, on the first day of February in each year, to make up a list, giving the name and residence of its stockholders, the number of shares owned by each and the market value of the same, and to return the list to the commissioner of the revenue for the county, city, town or district in which the bank is situated.

This is different from the original act, but does not affect the question at issue.

(3) The third clause makes it the duty of the commissioner of the revenue, *on or after the first day of February* in each year, to assess each stockholder upon the shares of stock, at its market value, on the first day of February in each year, a tax of thirty cents on every hundred dollars' value thereof, the proceeds of which shall be applied to the support of the government, and a further tax of ten cents on every hundred dollars' value thereof, which shall be applied to the support of the public free schools of the State.

This is entirely new, and is done to avoid the question under the Constitution of the State, which is hereafter raised.

(4) The commissioner of the revenue was then required to make out three assessment lists. To give one to the bank, one to the auditor, and to retain one for himself. None is provided for the stockholder.

(5) The fifth clause declared that notice given to the bank shall have the legal force and effect of a summons upon garnishment formally issued and regularly served.

This declaration is consistent only with the theory that a judicial function had been performed by the commissioner in assessing the tax. Only under such judicial action could a process of garnishment be issued. The assessment made by the commissioner is a judicial, not a ministerial, act.

(6) The sixth clause provides that the tax assessed shall be "a first lien upon the stock standing in the name of the stock-

holder, and upon the dividend due or to become due thereon, no matter in whose possession found, and should have priority over any and all liens by deed of trust, mortgage, bill of sale, or other assignment made by the owner or holder, and should take priority over all liens by execution, garnishment or attachment process sued out by the creditors of the stockholder."

Your Honors will perceive that this is a modification of the original section 17, inasmuch as it declares the existence of this lien, but makes the bank only responsible *as a garnishee,* for such sums of money as may then be in its hands, or which may thereafter come into its hands, belonging to the stockholder. It cures only one of the many evils of the original act, to wit: that which required the bank to pay whether it had money of the stockholder or not.

(7) The seventh clause provides that the dividend, or other money of the stockholder, which may come into the hands of the bank, shall be applied by the bank to the payment of the tax assessed against the stockholder; declaring that such payment shall acquit the bank of all liability; but at the same time it provided, that after making report to the commissioner of the revenue, the bank may, on or before the first day of June in each year, pay the tax assessed directly to the auditor of public accounts.

(8) The eighth clause provides that should the bank fail so to pay the tax, the auditor of public accounts shall transmit to the treasurer of the county, city, town or district in which the bank is located, a copy of the assessment list furnished him by the commissioner of the revenue, and the treasurer shall then collect the taxes therein assessed, and to do this he is authorized to levy upon the stock of the taxpayer, and sell the same at public auction for cash, giving the purchaser a bill of sale for the same. And the bank is required, when this bill of sale is presented to it by the purchaser, to cause the stock therein described to be transferred to the said purchaser. Which transfer the law says shall carry a clear and unencumbered title to said stock.

Your Honors will perceive that none of these provisions give any opportunity for the shareholder to have his day in court. There is no due process of law bringing him face to face with the officer whose judicial action is to be the basis upon which his property is to be taken from him.

(9) The law then provides that if the tax so assessed against the stockholder is not collected in any of the modes thereinbefore provided, the lists aforesaid shall stand, and be treated and have the legal effect of tax tickets, regularly made out against each of the stockholders named in the said list, as to which tax the right of levy or distress had accrued to the Commonwealth, and the treasurer shall then proceed to collect the same by levy or distress—having the authority and power conferred upon him by the law to collect other State taxes.

Your Honors will perceive from this that the law regards the assessment, made without notice to the parties whose property is assessed, *as a judgment,* to collect which tax tickets, which are executions, may be issued, and shall, in the hands of the treasurer, have all the power given to an execution.

(10) The next provision declares that should the bank also fail to comply with the provisions of this act, it shall be fined for each breach not less than one hundred dollars, nor more than five hundred dollars.

(11) The act closes with the declaration that "real estate of a bank or banking association shall be assessed on the land book of the commissioner of the revenue, with the same tax with which other real estate is assessed."

This is but a repetition of the closing sentence of the act of 1890. It merely provides that the real estate, which of course is a material element in estimating the market value of the capital stock of a bank, shall be re-taxed separately as real estate; thus clearly making a discrimination by a double tax against the national banks, and violating the provision of the National Banking Act, by making its tax greater in that respect than that assessed on other moneyed capital in the hands of individuals.

Referring to the whole act, your Honors will perceive that the amendment has not cured any of the defects, nor remedied any of the wrongs of which we complain, except to remove the violation of Art. X, section 16 of the Constitution of Virginia. It still assesses the shares of national bank stock at a higher rate than other moneyed capital, in that the stockholder is given no privilege to deduct debts due him from the assessed value of his stock, although that privilege is granted to the holder of investments of other moneyed capital; and further in the fact that by no due process of law is the shareholder ever given the opportunity to be heard as to the assessment made upon his stock, by which his property is to be taken from him.

Your Honors' attention is next called to the following abstract of section 8 of the general tax law of the State, known as *Schedule C*, showing what is regarded, under the said tax law, as other moneyed capital for taxation. (See copy of act, hereto attached as exhibit D.) This is essential to a true understanding of the questions at issue.

Schedule C of this act classifies personal property subject to taxation, and may be analyzed as follows:

(1) It is the duty of the commissioner of the revenue to require each person in his jurisdiction to exhibit and make oath to a statement in the aggregate of all bonds, notes and other evidences of debt due and payable to such person. This list shall include funds due from railroads and canal companies, bonds of counties, cities, towns, and bonds of other states and corporations, demands and claims however evidenced owing or coming to such person, whether due or not from debtors residing out of or within the State or country, whether secured by a deed of trust or judgment or not. In making this list, bonds, notes and other evidences of debt less in amount than one hundred dollars may be aggregated. The commissioner shall be the judge of the solvency and of the value of all such evidences of debt, and the list thereof *shall be signed by the commissioner and the taxpayer.*

(2) From the aggregate amount of such evidences of debt

there may be deducted all such bonds, demands or claims, not otherwise deducted, owing to others from the person owning the said evidence, as principal debtor and not as guarantor, endorser or surety, and the taxes shall be assessed only on the residuum after making such deduction.

The whole of section 8 is hereto attached under exhibit C, but it is unnecessary to make this analysis further than what is set forth above, as it is plain that every variety of property designated in the first division of section 8 is "other moneyed capital."

This analysis clearly shows that from "other moneyed capital" the privilege of deducting debts due by the owner is granted, while it is denied to moneyed capital invested in the stock of national banks.

Your Honors will find by the exhibits in the case filed with the amended and supplemental bill, that "other moneyed capital" under this clause of Schedule C, for the years during which the tax, of which complaint is now made, was imposed, amounts in sums running in round numbers from $26,000,000 to $29,000,000 (Record, pages 17 to 21, inclusive, and 68, 69), while the same evidence further shows that moneyed capital invested in national banks, during the same years, in the State of Virginia, amounts only to $6,000,000. (Record, p. 70 to 76, inclusive.)

For your Honors' convenience we here insert section 5219 of the Revised Statutes, to wit:

> "Section 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by the authority of the State within which the association is located, but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to two restrictions. (a) That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and (b) that the shares of any national banking association owned by non-residents of any State shall be

taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes to the same extent, according to its value, as other real property is taxed."

This section was previously as follows:

"(1) Provided that nothing in this act shall be construed to prevent all the shares in any of said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state. (2) Provided further, that the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located. (3) Provided, also, that nothing in this act shall exempt the real estate of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

We have made this analysis and these recitations of the acts of the State Legislature and of Congress, which we believe bear upon the questions at issue in these causes, to save your Honors' time in the investigation.

In considering the question whether these acts contravene section 5219 of the Revised Statutes, the first thing to be determined is what is meant by other moneyed capital?

See Assignments of Error, VII, VIII, IX, XI, XIII, XIV, XVI, XVII; Record, p. 95-6-7-8.

The term has a very clear meaning as used in the national banking act. It is necessarily moneyed capital belonging to and used by individuals in any species of business or any transactions which compete with the moneyed capital invested in national bank stock. It is scarcely necessary to do more that state this proposition to prove it, and it is almost a waste of your Honors'

time to bring authorities which define the meaning of words, the significance of which is so clearly demonstrated by common sense illumined by human experience. But the Supreme Court has, on more than one occasion, given a definition of the term moneyed capital, and we take the liberty of calling your Honors' attention to two definitions given by the court as throwing light upon the questions now at issue.

In the case of *Evansville Bank* v. *Britton,* 105 U. S. 322, the court held:

> "The act of Congress does not make *the tax on personal property* the measure of the tax on bank shares in the State, but the tax on *moneyed capital* in the hands of individual citizens. *Credits, money loaned at interest,* and *demands against persons and corporations,* are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the *rights, credits, demands and money at interest,* mentioned in the Indiana statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way."

This definition must be construed in the light of the fact, which is set forth in the same opinion, that the schedule of the subject of taxation in the Indiana statute, from which the taxpayer may deduct his *bona fide* indebtedness, is as follows:

> "1. Credits or money at interest, either within or without the State, at par value.
>
> "2. All other demands against persons or bodies corporate either within or without this State.
>
> "3. Total amount of all credits."

Your Honors will perceive that this classification is practically identical with the classification under Schedule C in Virginia, and therefore the schedule in Virginia includes all moneyed capital as defined by the opinion of the Supreme Court above.

In the case of *Mercantile Bank* v. *New York*, 101 U. S. 138, the court held:

> "The main purpose of Congress in fixing the limits to State taxation on investments in shares of national banks was, to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of like character.
>
> "The term 'moneyed capital' as used in Revised Statutes, section 5219, respecting State taxation of shares in national banks embraces capital employed in national banks, and capital employed by individuals when *the object of their business is the making of profit by the use of their moneyed capital as money.*"

Under these definitions, your Honors will perceive, would necessarily be included *"all bonds, notes and other evidences of debt, and all bonds due from railroad and canal companies, bonds of counties, cities and towns, and bonds of other States and corporations, demands and claims however evidenced owing or coming to such person, whether due or not from debtors residing out of or within the State or country."* (Quoted from Schedule C.) It is this moneyed capital which, under the Virginia Schedule C, amounts to over $26,000,000, and which comes in competition with the $6,000,000 of moneyed capital invested in national bank stock, yet it is from this $26,000,000 or $27,000,000 of moneyed capital, that the State allows the indebtedness of owners to be deducted, and denies the same privilege to those owning the $6,000,000 of national bank stock. This large amount of moneyed capital comes in direct competition with the moneyed capital invested in national bank stock, and this fact shows that the acts, of which we complain, are hostile and unfriendly to national banks, and in direct violation of the limitations which the law of Congress has imposed for their protection.

Having thus analyzed the tax laws, of which we complain, and called your Honors' attention to what we regard as their vices, and having followed this analysis by quoting *in ex-*

tenso the act of Congress, limiting the power of the State to tax national bank stock, and cited all the definitions given by the Supreme Court to the limiting term "other moneyed capital," we will proceed with the argument.

Probably this can be done best, at the outset, through the medium of illustrations taken from every day experience.

For example: A and B each have $5,000 in money. A invests his in fifty shares of stock of a national bank just starting in his community. B uses his $5,000 in discounting notes and shaving paper in the same community, thus coming in direct competition with the bank in which A has invested his money. Both desire to enlarge the scope of their investments, therefore A puts up his stock as collateral, and borrows $5,000 more, and increases his subscription to one hundred shares. B puts up as collateral some of the notes and bonds he has discounted or purchased and borrows $5,000 more, which he invests in more notes and more bonds. When the commissioner of the revenue comes to assess the property of A and B, respectively, B is allowed to deduct from his total of $10,000 the $5,000 which he borrowed, but A is denied that privilege, and has to pay tax on the market value of one hundred shares of stock standing in his name on the books of the bank without any deduction. The effect of this is, first, to destroy the equality of taxation upon the property of two investors, and, secondly, to injure the market value of the stock because of its liability to this unjust discrimination.

If in the community from which this illustration is taken there is a large amount of other moneyed capital thus competing with the moneyed capital invested in national banks, in amounts bearing the proportion of 27 to 6, as in this State, your Honors can well perceive that the discrimination against the national bank is very injurious to the interests of its stockholders.

The case of *Van Allen* v. *Assessors*, 3 Wall. 573, is a striking illustration of the view of this court that Congress, in permitting and restricting at the same time the power of the States to tax shares in national banks, intended that the State should not adopt

a system of taxation which would operate to prejudice the shares in national banks. In that case the State of New York imposed a tax upon the shares of stock in national banks, but taxed the State banks upon their capital, thereby enabling the State banks to take from their assessment their investments in United States bonds, which were non-taxable. Justice Nelson, in delivering the opinion of the court, concurred in by all of the judges, page 18, says:

> "The defect is this: one of the limitations in the act of Congress is 'that the tax so imposed under the laws of any State upon the shares of the associations authorized by the act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located.' The enabling act of the State contains no such limitation. The banks of the State are taxed upon their capital; and although the act provides that the tax on the shares of the national banks shall not exceed the par value, yet, inasmuch as the capital of the State banks may consist of the bonds of the United States, which are exempt from State taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders."

In what does this differ from including the real estate in the valuation of the stock, and then taxing the real estate separately?

~~At the time of this decision, the restriction of the power of the States to tax was much more limited than now, as the restriction then applied solely to shares of banks organized under the State law. Now the restriction is extended to all moneyed capital in the hands of individuals.~~ If the Supreme Court held invalid a law which taxed the capital of the State banks, and not the shares in the banks, and thereby enabled the State banks to reap the advantage of a deduction which the shareholders in the national banks could not avail themselves of, can the State of Virginia tax the shares in national banks so as to tax the whole market value of the shares, embracing the real estate owned by the banks, and in addition tax the real estate separately, thus imposing a double tax upon the property of the shareholders by an indirect method, not applied to any other

individuals possessing moneyed capital which is taxed? In other words, if an individual owned $100,000 of choses in action and $100,000 of real estate, he pays taxes on $200,000. If bank stock is worth $200,000, of which $100,000 is real estate, taxes are paid on $300,000, as this real estate is taxed separately as $100,000 of real estate, and then in taking the market value of the stock, one half of the value of the stock comes from the real estate. Does not this defeat the very object had in view by Congress, in preventing such discrimination that the equal inducement to citizens to invest in the shares of national banks would be done away with by the State law, because, present it as you will, all of the property of the bank is represented by the market value of the shares, and if the owner of the share is either directly or by indirection taxed one third more than the property of another individual invested in other property, the inducement is of necessity greater to invest in property other than shares of national banks. The usual tax in the cities of this Commonwealth, state and city, is about two *per cent.*, and while the owner of $100,000 of real estate and $100,000 of debts would pay two *per cent.* on $200,000 of property, the shareholder in the national banks would pay three *per cent.* on property of equal value.

Other illustrations might be cited, but this is enough to show to your Honors the point which we make, and to demonstrate how the laws, of which we complain, discriminate against national banks, and that the result of such discrimination operates adversely to the owner of stock not only by increasing the amount of tax which he pays, but by depreciating the market value of the stock which he owns.

The construction of the scope and limiting power of the national banking law, for which we now contend, has been sustained by many decisions of the Supreme Court of the United States, and this construction was placed upon it by the Circuit Court in the case of *First National Bank of Richmond* v. *The City of Richmond,* 39 Fed. Rep. 309, and the decision of that court was one of the earliest made upon that subject.

In that case the City of Richmond had undertaken to tax the capital of the bank *in solido*, and in that respect it differed from the case at bar, but there were principles involved which are exactly the same with those upon which your Honors are now called upon to act. The court in that case held that the City of Richmond had no right to tax the capital of the bank *in solido*, but only the shares of stock in the hands of individuals, *in order that the owner may deduct from their value the amount of his personal indebtedness*, the court saying:

> "There is no room for doubt of the fact that the city of Richmond, in assessing the tax complained of in the matter described in the bill, does discriminate against shareholders of national banks in favor of other moneyed capital in all the respects specified, and that this discrimination violates alike a leading provision of section 5219 of the United States Revised Statutes, a like provision of the 10th article of the Virginia Constitution and a just provision of an ordinance of Richmond conferring the privilege of great importance upon a holder of taxable securities who themselves owe debts."

This privilege was that of deducting their indebtedness from the value of the property to be taxed.

This decision of that court is quoted approvingly as the law of the land by the comptroller of the currency in his report for the year 1896. As far back as 1877 the Circuit Court of the United States, in the case of the *City National Bank* v. *Paducah* (1 Thompson National Bank Cases, 300), said:

> "The law will look not at the manner in which the tax is imposed, but at the result. . . . It is true exact conformity can never be attained, but the law requires at least an approximation to it, *else the proviso in the Revised Statutes is useless.*"

In the case of *People* v. *Weaver*, 100 U. S. 539 (on page 542), Mr. Justice Miller, who probably had given this subject more consideration than any lawyer in the country, in delivering the opinion of the court, said:

> "It cannot be disputed—it is not disputed here—nor is it denied in the opinion of the State court, that the effect of the

State law is to permit a citizen of New York, who has moneyed capital invested otherwise than in banks, *to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stock can make no such deduction. Nor, inasmuch as nearly all the banks in that State and in all others are national banks, can it be denied that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested, who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the national bank shares as subjects of taxation unfavorable to the owners of such shares, is also free from doubt. The question we are called to decide is, whether Congress, in passing the act which subjected these shares to taxation in the State, intended by the very clause which was designed to prevent discrimination between national bank shares and other moneyed capital, to authorize such a result.*"

. . . . . .

"*We are, therefore, of opinion that the statute of New York, as construed by the Court of Appeals, in refusing to plaintiff the same deduction for debts due by him from the valuation of his shares of national bank stock that it allows to those who have moneyed capital otherwise invested, is in conflict with the act of Congress, and the judgment of that court will be reversed and the case remanded for further proceedings in conformity to this opinion.*"

This decision reversed the same cases in 67 N. Y. 516, and overrules *The People* v. *Dolan and others,* 36 N. Y. 59.

In the case of *People* v. *Weaver,* 100 U. S., p. 539, the New York statute was as follows:

"If any person shall, at any time before the assessors shall have completed their assessments, make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that *the value of the personal estate owned by him after deducting his just debts,* and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate or both, as the case may be, at the sum specified in such affidavit, and no more."

It will be seen on page 540 that while the shareholders in a national bank gave in their shares before the assessor, they were allowed no deduction for indebtedness. Nothing could have been more general than the New York statute, but being general in its terms it necessarily embraced all moneyed capital as well as other property.

This court held that this was a discrimination prejudicial to national banks, and the court decided that neither by the method of assessment nor by the rate of taxation was it intended by Congress that a discrimination should be made. See more particularly pages 544-5. On page 544 the court says:

> "That such was the intent of Congress can admit of no doubt. Have they given expression to that intent so that courts can see and enforce it, or have they expressed themselves so unfortunately that the States may, by a narrow interpretation of the act of Congress, and by skillfully framed statutes of their own, exercise the power thus granted so as not only to reap its full benefit, but at the same time cause the burden of supporting the State government to fall with unequal weight on the subject of taxation thus surrendered to it by the national government?"

In the case of *Evansville Bank* v. *Britton*, 105 U. S. 322, it was held that:

> "The taxation of national bank shares by the statute of Indiana, *without permitting the owner of them to deduct from their assessed value the amount of his bona fide indebtedness, as he may in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress.*

Especial attention is called to the opinion of Mr. Justice Miller in this case, where he says, in delivering the opinion of the court, on page 323:

> "A distinction is attempted to be drawn between the Indiana statute and the New York statute, because the former permitted the deduction of the tax-payer's indebtedness to be made from the valuation of his personal property, *while in Indiana he can only deduct it from his credits.* And undoubtedly there is such a difference in the laws of the two States.

But if one of them is more directly in conflict with the act of Congress than the other, it is the Indiana statute. In its schedule the subject of taxation from which the tax payer may deduct his *bona fide* indebtedness is placed under two heads, as follows:

"'1. Credits or money at interest, either within or without the State, at par value.

"'2. All other demands against persons or bodies corporate either within or without this State.

"'3. Total amount of all credits.'"

"The act of Congress does not make the *tax on personal property* the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations, are more purely representative of moneyed capital than personal property, so far as they can be said to differ.

"Undoubtedly, there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, *because personal property is not necessarily moneyed capital. But the rights, credits, demands and money at interest, mentioned in the Indiana statute, from which bona fide debts may be deducted, all mean moneyed capital invested in that way.*

"It is unnecessary to repeat the argument in *People* v. *Weaver* (100 U. S. 539), on this point. *We are of opinion that the taxation of bank shares by the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his bona fide indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress.*"

This case and definition of moneyed capital is approved on p. 157, *Mercantile Bank* v. *N. Y.* 121 U. S.

In *Pelton* v. *National Bank,* 101 U. S. 143, the court says (see page 146):

"It is sufficient to say that we are quite satisfied that any system of assessment of taxes which exacts from the owner of the shares of a national bank a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner, does tax them at a greater rate within the meaning of the act of Congress." (See next clause.)

See *Cummings* v. *National Bank*, 101 U. S. 153, which was considered at the same time in conference with the above case, and *which announces the doctrine that injunction is the true remedy against such wrongs.* (See page 156.)

In the case of *Supervisors* v. *Stanley*, 105 U. S. 305, it was held that:

> "*The provision of the statute of 1866 of New York, providing for the assessment and taxation of the stockholders of a bank or banking association on the value of their shares of stock, are in conflict with the act of Congress, so far as they do not permit a stockholder of a national bank to deduct the amount of his just debts from the assessed value of his stock, while by the laws of the State the owner of all other personal taxable property can deduct such debts from its value.*"

See, as citing and approving the case of *Supervisors* v. *Stanley*, *Hills* v. *Exchange Bank*, 105 N. Y. 319.

In *Boyer* v. *Boyer*, 113 U. S. 689, it was held, Mr. Justice Harlan delivering the opinion of the court, that:

> "The effect, if not the object of the latter act (act of February 10, 1868, 15 Stat. 34, Ch. 7, which went at this time into operation), was to preclude the possibility of any such interpretation of the act of Congress as would justify States, while imposing the same taxation upon national bank shares as upon shares in State banks, from discriminating against national bank shares, in favor of moneyed capital not invested in State bank stock. At any rate, the acts of Congress do not now permit any such discrimination.
>
> . . . . . .
>
> "Whether the proposed taxation for county purposes of the plaintiff's shares of national bank stock is at a greater rate than is assessed for like purposes, on other moneyed capital, in the hands of individual citizens, is the single question upon which depends the affirmance or reversal of the judgment." (p. 692; see. p. 693).

The court in the case of *Boyer* v. *Boyer, supra,* in reviewing carefully the decision in *People* v. *Weaver, Pelton* v. *National Bank, Cummings* v. *National Bank, Supervisors* v. *Stanley,* and *Evansville Bank* v. *Britton,* makes the following summary, to

which your Honors' attention is called as conclusive upon the point now involved, a summary of the law which has never, by any other decision subsequent thereto, been overruled or even modified, and is the law of the land to-day:

> "From these cases may be deduced certain rules for the construction of that act:
>
> "1. That the words 'at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens' refer to the entire process of assessment which, in the case of national bank shares, includes both their valuation and the rate of percentage on such valuation; consequently, that the Act of Congress is violated, if, in connection with a fixed percentage applicable to the valuation alike of national bank shares and of other moneyed investments or capital, the State law establishes or permits a mode of assessment by which such shares are valued higher in proportion to their real value than is other moneyed capital.
>
> "2. *That a State law which permits individual citizens to deduct their just debts from the valuation of their personal property of every kind, other than national bank shares, or which permits the tax-payer to deduct from the sum of his credits, money at interest or other demands to the extent of his bona fide indebtedness, leaving the remainder to be taxed, while it denies the same right of deduction from the cash value of bank shares, operates to tax the latter at a greater rate than other moneyed capital.*
>
> "These decisions show that, in whatever form the question has arisen, this court has steadily kept in view the intention of Congress not to permit any substantial discrimination in favor of moneyed capital, in the hands of individual citizens, as against capital invested in the shares of national banks."

In reference to the question as to what is meant by "other moneyed capital" and the difference in the rates of taxation between that imposed upon such capital and that imposed upon the stock of national banks, the court refers to the case of *Hepburn* v. *The School Directors*, 23 Wall, 480, which, it says, is authority for the proposition that a *partial* exemption by a State for local purposes, of moneyed capital in the hands of individual citizens, does not, of itself, and without reference to the aggregate amount of moneyed capital, not so exempted, establish the

right to a similar exemption in favor of national bank shares held by persons within the same jurisdiction, and which holds as follows:

> "But it is by no means an authority for the broad proposition that national bank shares may be subjected to local taxation where a *very material part*, relatively, of other moneyed capital in the hands of individual citizens within the same jurisdiction or taxing district, is exempted from such taxation. Indeed such an interpretation of the statutes might entirely defeat the purpose that induced Congress to confine State taxation of national bank shares within the limit of equality with other moneyed capital; for, it would enable the States to impose upon capital invested in such shares materially greater burdens than those to which other moneyed capital in individual hands is subjected." (p. 693.)

That case is the first which indicates that a difference should be made between a law which makes a discrimination in favor of an *immaterial* amount of moneyed capital and one where the amount is material. Exact equality is unattainable, says the court, hence where the evidence shows that the result makes but small difference, the court should not interfere.

The case of *Boyer* v. *Boyer*, 113 U. S., p. 689, is a very strong case in our behalf. The question there arose as to whether there was a discrimination in exempting moneyed capital from county taxation when shares of national banks were permitted to be taxed by the county. There being some confusion in the various acts of Pennsylvania, commencing in 1844, the court, on page 699, says:

> "Unless we greatly misapprehend the effect of this legislation, a very large amount of property made subject by the Act of 1844 to taxation for both State and county purposes, has since been relieved from the burden of county taxation, while the imposition by the Act of 1870 upon national bank shares of local taxation at the same rate as was at the latter date, or has been since, imposed upon other moneyed capital in the hands of individual citizens of the State, leaves such shares subject to taxation as provided in the Act of 1844. The burden of county taxation, imposed by the latter act, has,

at all events, been removed from all bonds or certificates of loan issued by any railroad company incorporated by the State; from shares of stock in the hands of stockholders of any institution or company of the State which, in its corporate capacity is liable to pay a tax into the State treasury under the Act of 1859; from mortgages, judgments, and recognizances of every kind; from moneys due or owing upon articles of agreement for the sale of real estate; from all loans however made by corporations which are taxable for State purposes when such corporations pay into the State treasury the required tax on such indebtedness."

We can omit from the classification made above by the court shares of stock in the hands of stockholders in any company or institution, under the ruling of the court in the case of the *Mercantile Bank* v. *New York,* 121 U. S. (see page 147); therefore we are brought down by *Boyer* v. *Boyer,* qualified by the *Mercantile Bank* v. *New York,* to having a decision by this court that where there was an exemption from county taxation "all bonds or certificates of loan issued by any railroad company incorporated by the State, mortgages, judgments, recognizances of every kind, moneys due or owing upon articles of agreement for the sale of real estate, all loans, however made, by corporations, are taxable for State purposes, when such corporations pay into the State treasury the required tax on such indebtedness," it is a discrimination against the shareholders in national banks. The court on page 701 says:

"The exemptions in favor of other moneyed capital appear to be of such a substantial character in amount as to take the present case out of the operation of the rule *that it is not absolute equality that is contemplated by the act of Congress*—a rule which rests upon the ground that exact uniformity or equality of taxation cannot, in the nature of things, be expected or attained under any system. But as *substantial equality is attainable and is required by the supreme law of the land, in respect of State taxation of national bank shares, when the inequality is so palpable as to show that the discrimination against capital invested in such shares is serious, the courts have no discretion but to interfere.*"

In *Mercantile Bank* v. *New York,* 121 U. S. 138, it was

claimed that the law of New York which exempted the shares of stock in trust companies and savings banks from taxation, and yet imposed a tax upon the shares of national banks, was void because it made a discrimination against the shares of national banks, but the court held that this was not so, and said that it was because the shares of trust companies and savings banks were so taxed in two other modes "that it does not appear that the right of taxation thus imposed by the laws of New York is less than that upon shares in national banks."

In this case the court held (see page 138):

> "The main purpose of Congress in fixing the limits to State taxation on investments in shares of national banks was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of like character.
>
> "The term 'moneyed capital' as used in Revised Statutes, section 5219, respecting State taxation of shares in national banks, embraces capital employed in national banks, and capital employed by individuals when the object of their business *is the making of profit by the use of their moneyed capital as money.*"

In the case of *Mercantile Bank* v. *New York*, 121 U. S., p. 138, except so far as it reviews other cases, and limits the meaning of moneyed capital by excluding railroads, mining companies, insurance companies, and various other corporations, is of little interest. We have no savings banks in Virginia, that is, banks with no capital stock organized simply for the purpose of enabling people with small amounts of money to have a place to deposit it, and no stockholders to reap any profits, and the court says on page 161:

> "However large, therefore, may be the amount of moneyed capital in the hands of individuals in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the ruling for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation."

On p. 159 the court says that while the capital of trust companies is not moneyed capital, *its shares of stock are,* because part of its capital is loaned out.

None of these matters considered in this case interest us here.

On page 162, the court, in speaking of bonds of the State of New York, or of its public municipal bodies, says they are very properly exempt from any taxation, although they undoubtedly represent moneyed capital.

There is, under the Virginia statute, no question of exemption, therefore no question arises as to whether the State, by exempting one class of securities or another affects adversely shares in national banks. The bonds, notes, etc., which are taxed, but allowed the deduction of debts, by the Virginia statute are all moneyed capital. It is also held in that case that there are certain other institutions which represent moneyed capital, but that under the law of New York the method of taxing them is such as not to create a discrimination in their favor.

See *Van Allen* v. *Assessors,* 3 Wall. 573.

In the case of *Whitbeck* v. *Mercantile National Bank of Cleveland,* 127 U. S. 193, Mr. Justice Miller delivering the opinion, it was held that:

> "The statutes of Ohio regulating assessments for taxation allow an owner of moneyed capital other than shares in a national bank to have a deduction equal to his *bona fide* indebtedness made from the amount of the assessment of the value of such moneyed capital; but they make no provision for a similar deduction from the assessed value of shares in a national bank, and provide no means by which such deduction may be obtained. Held:
>
> "(1) That the owners of such shares are entitled to have a deduction of their indebtedness made from its assessed value as in the case of other moneyed capital; and
>
> "(2) That the right to it is not lost by not making a demand for it until the entire process of the appraisement and equalization of the value of the shares for taxation is completed, and the tax duplicate is delivered to the treasurer for collection."

In the case of the *Mercantile National Bank of Cleveland* v. *Shields,* 59 Fed. Rep. 952, the Circuit Court of the United States for the Northern District of Ohio held:

> "1. Rev. St. U. S., sec. 5219, provides that taxation by a State of the shares of a national bank situated therein 'shall not be at a greater rate than is assessed upon other moneyed capital in the hands of the individual citizens of such State.' Held, that the *term 'moneyed capital' means money employed in a business whose object is to make profit by investing such money in securities by way of loan, discount or otherwise, which from time to time, in the course of business, are reduced again to money and reinvested.*
>
> "2. Rev. St. Ohio, sec. 2730, allows a deduction of *bona fide* debts owing by citizens of the State to be made from credits held by them for purposes of taxation, but the State courts held that such deduction is not allowable from shares in a national bank. Held, *that this is a discrimination in favor of 'other moneyed capital' of the State, and against national banks, within the prohibition of Rev. St. U. S., sec. 5219; and it is not less so from the fact that the deduction is also denied in the case of shares of railroads, insurance companies, and manufacturing corporations, for they are not 'moneyed capital.'*
>
> "3. Under Rev. St. U. S., sec. 5219, providing 'that the shares of any national banking association owned by non-residents of any State may be taxed where the bank is located,' a non-resident shareholder being compelled to pay the tax at such place, is entitled to all deductions from the value of his shares, on account of debts, that are allowed to resident shareholders."

The case of the *Aberdeen Bank* v. *Chehalis County,* 166 U. S. 440, is confusing upon the first reading, but an analysis shows that it does not lay down any doctrine differing from previous decisions of the court. All that could be said is that it might seem that the rule of pleading laid down by the majority of the court was very strict, but outside of the rule of pleading there is no special point involved which affects the case under consideration.

The opinion of Justice Shiras, from page 443 to the middle of page 446, deals exclusively with the question as to whether,

under the statute of the State of Washington, the capital of national banks was taxed, instead of shares of stock. Necessarily following the decisions of the Supreme Court of Washington on the construction of State statutes, the court held that two sections should be read together, and, as a result, the tax was upon the shares, and not the capital of banks, and that hence the bank was simply the agent of the State in collecting the taxes from the shareholders. The court then, from the middle of page 446 to page 449, quotes, and states the allegations of the bill. From page 449 to page 461 the court reviews and quotes previous decisions of the Supreme Court of the United States. On pages 461-2 it gives its conclusions as to the sufficiency of the allegations of the bill, *holding that the allegations were two general and indefinite and that the presumptions must be against the pleader,* saying:

> **"It is indeed alleged in the bill that these investments were taxable capital, but that is an averment in the nature of a legal conclusion. If those loans and securities had been identified in the bill or their character described, the court might have reached a different conclusion as to their taxable character."**

There is no such difficulty in our case, as we file with our amended bill the schedule made up by the auditor, entirely segregating the different classes of property, and showing exactly what is embraced under the first subdivision, section 8, Schedule C, of the acts of 1889-90, and our Court of Appeals has held that stocks are *not* embraced in the list of debts, etc., from which the deduction is allowed to be made.

But to return to the case of *Aberdeen Bank* v. *Chehalis County*. In this case, as appears on page 462, the question seems to have risen in a very peculiar way, and one which makes it difficult to follow the opinion. It appears that there was no statute in the State of Washington which created the alleged discrimination, but that there was some opinion of the attorney general of the State, which it was claimed induced the assessors to make the alleged discrimination. This opinion was not filed with the bill, and the court on this subject says:

"The Supreme Court of the State of Washington adverting to this allegation of the bill, suggests that it is probable that the opinion referred to was one dated February 5th, 1891, addressed to the State auditor, and in which the attorney general advises that accounts, promissory notes and mortgages were to be exempted in order perhaps to avoid double taxation. And the Supreme Court well observes that if the action of the assessors was based upon this decision of the law officer of the State and went no further the allegations of the bill would certainly turn out to be unsupported.

"We agree with the Supreme Court of Washington in thinking that the allegations of this complaint nowhere showed that any moneyed capital of the character defined by the Federal Supreme Court was omitted or intended to be omitted by the assessors; or if the intention of the complaint be to cover any such existing cases the allegations are so general and indefinite that they cannot be made the basis of action."

On p. 459 the court re-affirms the definition of moneyed capital in *Bank of Evansville* v. *Britton*.

Whether the decision of the majority (5 to 4) of the Supreme Court may seem conclusive to other minds on questions of pleading is immaterial, the fact remains that the decision of the court in that case *was based on the insufficiency and too general allegations of the bill and does not affect cases which are not subject to this criticism.*

The case of *Wasson* v. *First National Bank*, 107 Indiana, p. 216 (8 Northeastern Reporter, p. 97), contains one of the most admirable reviews we have seen on the subject of discrimination against national banks, where certain kinds of moneyed capital are allowed a deduction for debts, while the shareholder in national banks is not. From near the top of page 100 to the end, the views of the court are expressed with great clearness and ability. Under the statute of Indiana there was no discrimination against a large portion of moneyed capital, as well as shares of stock in national banks; *yet the court states that it takes judicial notice of the fact that the moneyed capital, from which deduction of debts was allowed, was of sufficient magnitude to be prejudicial to national banks.*

We would quote from the opinion of the court, but five pages are so admirably expressed that we beg the court to read them, and they are too long for a quotation.

The great difference in the scope given to the same words in the statutes in different states is very striking. The word "credits," for instance, is given a different meaning in every statute we have seen. It is misleading until the definition of credits is ascertained from the statutes of the different States.

In the case of *Bank of Redemption* v. *Boston*, 125 U. S., p. 68, in speaking of savings banks, the court says:

> "But the difference mentioned, if it exists at all, is immaterial; the main purpose and chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the Mercantile Bank. They are substantially institutions, under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase. We adhere to the rule as declared in the cases heretofore decided, which forecloses further discussion as to the present point in this case."

The case of the *First National Bank of Garnet* v. *Ayers*, 160 U. S. 660, when analyzed, shows (see page 667) that the plaintiff in that case desired the court to take judicial notice of the fact "that the amount of moneyed capital in the State of Kansas from which debts may be deducted, as compared with moneyed capital invested in shares of national banks, was so large and substantial as to amount to an illegal discrimination against national bank shareholders."

"This," said the court, "we cannot do. There is no proof whatever upon the subject. The State court has itself determined from its own knowledge that credits, from which debts may be deducted, do not constitute a large or even material part of the moneyed capital of the State."

This case turned on the failure of the plaintiff to show that there was any material discrimination, and the court says:

> "As the record appears, there is no fact of which the court can take judicial notice. . . . When proof shall be made

> regarding that matter it may then be determined intelligently whether within the case of the *Mercantile Bank* v. *New York*, 121 U. S. 138, there has been a real discrimination against the holders of national bank shares, and hence a violation of the above cited Act of Congress."

In our cases, the statements made by the auditor of public accounts, which are filed as parts of the amended bill, show that what is strictly moneyed capital amounts *to a balance of from twenty-six million to twenty-nine million dollars each year, after the deduction of debts, and that the national banking capital of the State amounts to about six million dollars.* So there can be no question as to its appearing from the record that there is a material discrimination. This is clearly shown by the exhibits from the annual report of the auditor of public accounts. To this we may add the aggregate value of all bonds, notes and other evidences of debt under $100, which are placed in accordance with law under a separate heading, and amount, in addition, to very nearly two million of dollars. (See auditor's statement, Record, p. 17 to 21, and 68-9.) In this is not embraced stocks in corporations, such as the Supreme Court has held not to come in competition with national banks.

The first subdivision of Schedule C, section 8, covers the very definition given by the Supreme Court as to the character of moneyed capital which comes in competition with national banks.

The case of the *First National Bank of Wellington* v. *Chapman*, 173 U. S., p. 205, involves practically the same questions as were involved in the cases in 160 and 166 U. S., to which reference is made above. On page 219, the court says:

> "We are therefore unable to say whether there has been or has not been any material discrimination such as the federal statute was enacted to prevent.
>
> "We cannot from these facts note any substantial difference between this case and that of the *Bank of Garnet* v. *Ayers*, 160 U. S. p. 660, the *Aberdeen Bank* v. *Chehalis County*, 166 U. S. p. 440, and *Bank of Commerce* v. *Seattle*, 166 U. S., p. 463.
>
> "We find in the record in this cause no means of ascer-

taining whether there is any unfavorable discrimination against the shareholders of national banks and the taxation of their shares and in favor of other moneyed capital in the hands of individual citizens. What were the full statements of the petition filed in this case does not appear in the report. The petition was answered and the trial court found the facts. There was nothing in the finding of these facts which would intimate that the discrimination claimed was material. In fact, there was no finding on this subject at all, and the court was left altogether to the consideration of the statute of Ohio to ascertain whether on the face of the same there was a material discrimination. Upon examination of the Ohio statute, p. 209, it appears that there were various classifications of property. Classifications b, c, d, e, f are as follows:

"b. 'Investments in bonds' includes moneys in bonds or certificates of indebtedness of whatever kind, issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, States or other corporations, or by the United States.

"c. 'Investment in stock' includes all moneys invested in the capital or stock of any association, corporation, joint stock company or other company, where the capital or stock is divided into shares, transferable by each owner without the consent of the other shareholders, for the taxation of which no special provision is made by law.

"d. 'Personal property' includes (1) every tangible thing the subject of ownership, whether animate or inanimate, other than money, and not forming part or parcel of real property; (2) the capital stock, undivided profits, and all other means not forming part of the capital stock of a company, whether incorporated or unincorporated, and all interest in such stock, profits or means, including shares in a vessel as therein stated; (3) money loaned on pledge or mortgage of real estate, although a deed may have been given, provided that parties consider it as security merely.

"e. The term 'moneys' includes surplus or undivided profits held by societies for savings or banks having no capital stock, gold or silver coin, bank notes of solvent banks in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand.

"f. The term 'credits' means the excess of the sum of all legal claims and demands, whether for money or other valua-

ble thing, or for labor or for service due or to become due, to the person liable to pay the tax thereon, including deposits in banks, or with persons in or out of the State, other than such as are held to be money as defined in this section, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal *bona fide* debts owing by such persons; but in making up the sum of such debts owing, no obligation can be taken into account: (1) to any mutual insurance company; (2) for any unpaid subscription to the capital stock of any joint stock company; (3) for any subscription to any religious, scientific or charitable purpose; (4) for any indebtedness acknowledged unless founded upon some consideration actually received and believed at the time of making the acknowledgment to be a full consideration therefor; (5) for any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; (6) for any greater amount or portion of any liability as surety than the person required to make the statement of such credits believes that such surety is in equity bound to pay, etc."

It is apparent that what would ordinarily be regarded as the great bulk of moneyed capital was embraced in other classifications than "f," and that the classification under "f," under the term "credits," was the only classification from which any deduction was allowed for indebtedness, and even this was very much curtailed. The result was that in the opinion of this court there was so much embraced under the term "credits" as used in this statute, which was not moneyed capital, that it would not undertake to state whether there was a material discrimination or not. For instance, "all legal claims and demands, whether for money or other valuable things or for labor or services, due or to become due to the person liable to pay taxes thereon," is as indefinite as language could be, so far as ascertaining to what extent moneyed capital was embraced under this classification in the statute.

It is a matter of common knowledge that in the great wheat and corn States, promises to deliver wheat and corn are very large in amount and value, and would be embraced by claims and demands for other valuable things, and yet would not be

moneyed capital, and, as the court says, "all kinds of service, from that of a common laborer to the highest professional, were embraced in this classification." On page 218 it says:

> "Of these there is no evidence as to what the total moneyed capital in the hands of individual citizens, and included in the term credits, amounts to, even under the widest definition of that term."

At the bottom of page 218, the court says, after referring to claims for labor and services:

> "We also know that there are probably large amounts of other forms of property which might enter into the class of credits, as defined in the act, which would not be moneyed capital, within the meaning of the Act of Congress, as that meaning has been defined by this court in the case above cited. It is thus seen there are large and unknown amounts of what are in the act termed 'credits' which are not moneyed capital, and that the total amount of credits which are moneyed capital, within the definition given by this court to that term, is also unknown. That portion of credits which is not moneyed capital, as so defined, does not enter the question, because the comparison must be made with other moneyed capital in the hands of individual citizens. We are thus wholly prevented from ascertaining what proportion of the moneyed capital of individual citizens, included in the term 'credits' (and from which some classes of debts can be deducted), bears to the amount invested in national bank shares."

The court refers, in discussing this matter, to the claim on page 217 that the auditor's report shows the balance of credits, after deducting debts, was very large, and says it cannot consider this statement as in the record. It further says that even if it considered this statement, the definition of credits was too indefinite to be the basis of a judicial conclusion. Previous to this declaration, however, it had *disposed of the case because of the failure to make it appear in the record that the discrimination was material.*

The discussion of the court as to the difference in the assessment against shares of incorporated and unincorporated banks is

not material in our case, as no such question is involved. Unincorporated banks amount to little with us, and, in fact, there is no tax except that placed upon private bankers, and that is broad enough to cover all banks, incorporated or unincorporated, including national, if they do the business upon which a license has to be obtained, under the provision which defines a private banker. At one part of the opinion the court would seem to lay some stress on the equal taxation of shares in national and State banks, but that was a mere method adopted by the judge in expressing his opinion, as the law was expressly changed, as in section 5219, so as not to confine the restriction to shares in State banks. On page 216-7 the court expressly repudiates this idea, because the original national banking act only required that the State should tax State and national banks equally.

As we stated above, this case laid down no new principle, but went off upon the failure of the bank to make it appear that there was a material discrimination. The case could not mean more than this, else it would nullify the statute.

In our case other moneyed capital, as defined by the court, is material in amount, as shown heretofore.

Take, for instance, from the auditor's report under the head, "value of all bonds, notes and other evidences of debt in excess of $100," this amounts to, for the year 1893, $27,590,700; "value of all bonds, notes and other evidences of debt under $100," $1,382,500, aggregating about $29,000,000, from which indebtedness had been deducted. The value of national bank stock for that year, as shown by the exhibit of taxation of national banks, amounts to about $6,000,000, and State banks about the same, so it is patent that the discrimination is material when other moneyed capital, after the deduction has been allowed, is about five times the amount of the market value of the shares in national banks. These tables, made up and published by the auditor, give a detailed statement of every classification of property.

In the Record, pages 17, 18, 19, 20, 21, 68, 69, will be found the statements showing the assessed value of each kind of personal property in the several counties and cities of the Common-

wealth for the years 1891 up to and including 1897. All the counties and the cities were omitted in printing, and only the items for Lynchburg printed, and the aggregate for the whole State at the foot.

On pages 70, 71, 72, 73, 74, 75 and 76 of the Record will be found the total assessment of the shares of all banks in the State of Virginia, with the number of shares of all the banks, the par value of all the shares, the assessed market value of all shares, the tax assessed for the support of the government, and separately the tax assessed for schools, and the total tax assessed and the total tax paid in. The counsel on both sides deeming it a useless expense to print the names of the several counties and cities of the Commonwealth in the statement taken from the auditor's report of the assessment of the value of each kind of personal property, and also deeming it a useless expense to print the name of each bank in the extract taken from the auditor's report, showing the shares of stock and assessment of the same, etc., of each bank, by stipulation on page 101 requested the clerk to omit the same except as to Lynchburg.

The Ohio statute mixed up different classes of property and securities to such an extent that it is impossible to extract from the face of the statute the extent to which moneyed capital was embraced under "credits." There was no question involved in this case as to the proper time or method for claiming the deduction, as the deduction was claimed by certain shareholders before the auditor, but on page 220 the court, referring to the previous decision in *Whitbeck* v. *Mercantile Bank*, 127 U. S., p. 193, said that in that case,

> "It was held that it was made in time for the reason that the court below expressly found that the law of Ohio makes no provision for the deduction of *bona fide* indebtedness of any shareholder of his stock and provided no means by which such deduction could be secured. As a demand at this early stage would have been useless, the court held it unnecessary."

We have considered elsewhere our statute which gives to the shareholder in a bank no opportunity to be heard before an assessor, auditor or court.

In the case of *Whitbeck* v. *Mercantile Bank,* 127 U. S., p. 199, it appears that the shareholders did not claim the deduction until the entire process of assessment was completed and the tax in the hands of the treasurer for collection, and that even then three of the shareholders had not claimed any deduction.

On page 200 the court intimates, as strongly as it could, that if the bank had appealed for them it would have given relief, for it says, in speaking of the court below, "it therefore granted relief by the injunction as to all of them except three, as to which it was denied." It is to be observed, however, that the bank took no appeal from the part of the decree denying relief to these three shareholders.

It would be unreasonable if any court should require shareholders to claim their deduction, when the law gives them no tribunal before which to make the claim, no notice, no opportunity, and rides roughshod over them. If it can be claimed, after the tax is in the hands of the treasurer for collection, and when the whole process of assessment is over, there is no logical reason why it cannot be claimed in the court in which suit is brought.

In the case of *Hills* v. *Exchange Bank,* 105 U. S. 319, it was in evidence that all proof of debts due by stockholders, which they claimed should be deducted, were rejected by the assessors, and that the assessors evidenced a fixed purpose to reject every such deduction, the court, in reversing the cause, held that these stockholders should be allowed an opportunity of setting up their deduction, and said on page 321:

> **"It is not, therefore, now essential to show such an application when it is established that there were debts to be deducted and when the matter is still *in fieri*, the taxes being unpaid."**

In the case of *Supervisors* v. *Stanley,* p. 309, it appears that under the New York statute, the stockholder gave in his stock along with other property, and had an opportunity of claiming his deduction, and asserting it before the assessor; yet the court held that because it was the settled purpose of the assessor *not to allow the deduction* it was useless for the stockholders to

claim it, and although none of the taxes had been paid an opportunity would be given the stockholders to establish the amount of his deduction.

The Supreme Court of Virginia, in *Burroughs* v. *Smith*, 95 Va. 694, does not seem to appreciate the real questions which were at issue. Whatever the real opinion of the court may have been, the discussion of the question, occupying only one page, shows that the court labored under the misapprehension of supposing that under section 5219 of the Revised Statutes, the discrimination must have been in favor of investments in stocks of other corporations, and not in bonds, notes, etc. The court reverses the position taken by the Supreme Court of the United States in a long line of cases, *and we must presume that the question was not presented to the court, as no consideration seems to have been given to the real point at issue.*

There is, however, one thing which is decided by the court in that case, which is, that stockholders in other corporations cannot deduct their indebtedness from other shares of stock. This relieves us from any confusion as to what was intended by the legislature under Schedule C, section 8, clause 1, and therefore it may be surely said that the clause only embraces moneyed capital in the hands of individuals, and not stock in other corporations which may have been considered moneyed capital.

The only question raised in the case of *Burroughs* v. *Smith* was the right of the taxpayer to deduct his debts from the market value of his stock. *It is a striking fact that with the great number of decisions by this court on this important question, the court refers to none, nor even to the principles involved in them.*

We are fortunate, however, in having the court to determine that under said act the privilege of deduction is confined, by the terms of the act, *to bonds, notes and other evidences of debt, which come within the very definition by this court of moneyed capital in the hands of individuals, and does not include stock in incorporated companies.*

We cite for your Honors' consideration, the following additional authorities:

"'Moneyed capital' in Rev. St., sec. 5219, embraces capital employed in national banks and that used by individuals in business for profit by use of it as money, but does not include that in hands of a corporation, even if its business be such as to make its shares moneyed capital, when in the hands of individuals, or if it invests its capital in securities, payable in money."

Mercantile Bank v. *New York,* 121 U. S. 138.

Newark Bank v. *Newark,* Ib. 163.

Talbot v. *Sliverbow County, Montana,* 139 U. S. 438.

"Where shares of stock are assessed at their actual cash value without any deduction for the real estate owned by the association the real estate should not be taxed *eo nomine.*"

Commissioners of Rice County v. *Citizens National Bank of Faribault,* 23 Minn. 280.

"In the assessment and taxation of shares of national bank stock, the owners thereof having no other credits or moneyed capital, are entitled to deduct their *bona fide* debts from the value of such shares of stock."

Wasson v. *Bank,* 8 N. E. 97.

"Section 5219 prohibits an adverse discrimination by a local government in the valuation of national bank stock for assessments as compared with an assessment by the same government for the same year of other moneyed capital invested so as to make a profit from the use thereof as money."

Puget Sound National Bank of Seattle v. *King County, et al.,* 57 Fed. Rep., 433.

"But where the tax laws of the State make the bank the mere agent for paying the taxes on shares, and direct it to retain so much of the dividends as will answer that purpose, other agents being required to pay taxes for their principals only when they have under their control the property, money or credits of such principals, the bank cannot be made liable unless it has the control of the property, etc., of its stockholders, or has dividends in its possession or has failed to retain them."

Hershire v. *First National Bank,* 35 Iowa, 272.

> "Under act, Lousiana, 1888, sec. 27, relating to the taxation of national bank shares, making no deduction for that part of the bank's property entering into their value which consists of non-taxable State and national securities, which deduction may, under the act, be made by individuals, a tax on national bank shares violates Rev. St., sec. 5219, prohibiting the assessment of such shares at a greater rate than moneyed capital in the hands of individual citizens; *and it is immaterial that the same discrimination is made against other corporations.*"

Whitney National Bank v. *Parker,* 41 Fed. Rep. 402.

Stanley v. *Supervisors of Albany,* 121 U. S., p. 542.

> "In *People* v. *Weaver,* 100 U. S. 539, this court held, with reference to taxation thus authorized, that the prohibition against discrimination has reference to the entire process of assessment and includes the valuation of the shares as well as the rate of percentage charged, and, therefore, that a statute of New York, which established a mode of assessment by which such shares were valued higher in proportion to their real value than other moneyed capital in the hands of individuals, was in conflict with the prohibition, although no greater percentage was levied on such valuation. If this were not so, a rule of appraisement applied to shares of national banks, different from one applied to other moneyed capital, might lead to such varied valuations as to materially affect the amount of taxes levied, although the same per centage should be charged on the valuations. There must be a uniform rule of appraisement of value, and the same per centage charged on the values determined, to meet the requirements of the statute."

See also page 546.

Evansville Bank v. *Britton,* 105 U. S. 322, affirmed in *Mercantile Bank* v. *N. Y.,* 121 U. S. 157, and *Aberdeen Bank* v. *Chehalis,* 166 U. S., p. 459, and other cases, is our case as to moneyed capital.

With our amended and supplemental bills we have filed a list of the stockholders, who were entitled to deductions of debts, which debts were not otherwise deducted.

There is also filed a statement of the real estate owned by each bank which should have been deducted from the market value of all the stock.

In conclusion of this subject we again call the court's attention to the following facts, which prevent the complications in this case, which existed in many of the decided cases:

First—There is no question as to whether the moneyed capital in the hands of individuals, from which the deduction of debts is permitted, is material. The deduction is permitted from all moneyed capital in the hands of individuals (without exemptions), and that is shown by the auditor's reports to amount to over twenty-five millions.

Second—There is no question as to whether the stockholders should have claimed the deduction before. The laws of Virginia gave them no opportunity to claim the deduction.

Third—There is no question as to whether the balance of the tax should have been tendered with the bill after making the deductions, because the validity of the whole assessment, and the law under which made, is contested. (1) As contrary to the Constitution of the United States, and (2) because void under the Constitution of Virginia, for reasons hereinafter stated. If the court is of this opinion no part of the tax is collectible; therefore the payment of every part is dependent upon the decision of the court on these two points.

Fourth—There is no question of the existence of all essential facts requisite to entitle the stockholders to the deductions, as the allegations of the bill, the amended bill and the exhibits, including the auditor's reports, filed as parts thereof, are admitted by the demurrers.

These cases present the question of deductions clean cut and clear of every entangling alliance or doubtful allegation. There is no confusion as to exemptions, nor as to the amount of moneyed capital from which deductions are allowed.

The case of the *National Bank of Baltimore* v. *City of Baltimore* is so entirely different from our case that a comparison is difficult to be drawn. Judge Brawley, 100 Federal Reporter,

p. 25, says that under the laws of Maryland the bank makes its return annually to the tax commissioner, requiring among other things the price at which any sales of its stock have been made during the year, and afterward deducting from its list of securities any which by law are exempt from taxation, and its real estate which is separately taxed, the actual market value of the whole of the capital stock, less such deductions, is charged against the bank. This system is so essentially different and so liberal a one to the banks that the banks in Virginia would rejoice if the legislature of this State would adopt that system. If the shareholder in banks in Virginia had deducted from the market value of their stock the United States bonds and real estate, the balance left to be taxed would be relatively so small that there would be no ground for complaint; and in determining the validity of a State law on the question of discrimination, of course the court must take into consideration the system of valuation adopted by the State. Most of the banks in Lynchburg would have very little left to be taxed upon if the State and United States bonds which they hold and their real estate were deducted from the valuation of the shares of stock. On page 26, in the paragraph next to the bottom, the judge says: "The main contention being that certain private bankers, whose business is competitive with the national banks by investing their capital, etc.", have an advantage over national banks. Then the opinion proceeds further on to deal with the evidence in the case and the system of taxing private bankers, and shows that, in the opinion of the court, private bankers are given no advantage, and on page 28, it appears from the evidence that in fact the national banks had in the result been benefited, as fifty-two million of additional bonds, etc., had been given in for taxation under the new system which had never been given in before, so the whole situation in this case, and the questions involved, are entirely different from ours. On page 29 the court uses the following language, as being the language of this court in *Mercantile National Bank* v. *City of New York*, 121 U. S. 157, and *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 463:

"It is the nature of the employment which fixes its character. Wherever money is employed in the carrying on of a business, the object of which is the making of profit by its use as money, it is moneyed capital. *When such capital is invested in loans or securities of a permanent or temporary character, if it is so invested with a view to sale and reinvestment for the purpose of making money by the operation,* it is moneyed capital. The securities themselves do not necessarily come within the definition. In other words, *moneyed capital is the tool or instrument; bonds and other securities are the material in and with which it operates.*"

But this is not the language nor the idea of the court, as we understand it, but the reverse. In *Aberdeen Bank* v. *Chehalis County,* page 459, the court says:

"The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, *either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment.* In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. Accordingly, it is said in *Evansville Bank* v. *Britton,* 105 U. S. 322: 'The act of Congress does not make the tax on personal property the measure of the tax on the bank shares in the State, but the tax on moneyed capital in the hands of individual citizens.' *Credits, moneys loaned at interest, and demands against persons and corporations, are more purely representative of moneyed capital than personal property, so far as they can be said to differ.* Undoubtedly, there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. *But the rights, credits, demands and money at interest mentioned in the Indiana statute,* from which *bona fide* debts may be deducted, *all mean moneyed capital invested in that way.*"

II.

We hold in the *second* place that these laws assessing the stock of national banks are void because they provide for an assess-

ment of a tax, and hence the deprivation of property, *without due process of law,* and thus infringe Article 14, section 1, of the Constitution of the United States, which says:

> **"Nor shall any State deprive any person of his life, liberty or property without due process of law."**

(See Assignments of Error, III, IV, XI.)

That taxation is a deprivation of property, in the sense of the constitutional provision, has often been decided by this court. It has also been often held that the "14th Amendment," as this provision of the Constitution is popularly called, applied to the assessment of property for taxation.

It is only necessary, therefore, for us to ascertain, under this head, whether, in the case at bar, any "due process of law" is accorded the stockholder, by these laws, in assessing his stock.

In the analysis of the law of March 5, 1890, under which the taxes of which we complain, from 1891 to 1895, inclusive, were laid, your Honors will remember that the assessment was to be made by the commissioner of the revenue of the city, town or district where the bank is situated, *in the month of May* in each year, and was during the same month to be reported by him to the auditor of public accounts at Richmond, and then that the bank, *on or before the first of June* in each year, was to pay the full amount of the tax assessed into the Treasury of the State —thus neither directly nor indirectly providing for any notice or even knowledge to the person whose property was to be assessed, or who was to be "deprived" of his money, of the time, the place, or the amount of the assessment.

No *time* was specified, except that it was to be in the month of May; it might be done at midnight or midday, at sunrise or sunset, on the first of the month or the last. It was a judgment to be rendered by the commissioner by which the stockholder's property was to be taken, of the day and hour of which he was to be kept in ignorance.

No *place* was designated. The assessment was to be made by the commissioner of the revenue in the month of May, but *where*

the statute does not say. The commissioner has no designated and legal office. His head-quarters, if not in the saddle, are in his saddle-bags. He may make the assessment as he follows his busy round of duty; as he sits with his family in the evening; as he reflects on his bed at midnight. The stockholder can never know *where,* any more than he can know *when,* he is to be deprived of his property by this star-chamber mode of judicial action.

The amendment of the 17th section adopted on the 3d of March, 1896, under which some of the assessments were made against the complainants, made no amendment which cured this vice.

The time when the assessment is to be made is rendered, by the amendment, even more indefinite, for the period during which it is to be made is lengthened from the "month of May" to "on or after the first of February" in each year. The place is left entirely uncertain. It is obvious that no place was contemplated by the statute.

Nor is this all. If the law is obeyed, the bank must pay the tax before any knowledge of the assessment could possibly reach the stockholder whose property was assessed. Thus he is deprived, by the operation of the law as written, both of actual notice and the opportunity for knowledge. Before any opportunity to obtain knowledge is given the knowledge would be too late. Any effort to shut the stable door would be needless, for the horse would be gone—the tax would be paid if the law is obeyed, before the stockholder could learn that the assessment was made.

The law gives no opportunity for the assessment to be reviewed or for an appeal therefrom. Laws providing for such assessments, as a rule, give the opportunity of an appeal to some board of equalization or to some tribunal where relief may be sought from unjust valuation. There is nothing of that sort in these laws, and hence it is we seek relief of a court of equity.

These laws do not even give us the opportunity to appeal to the commissioner himself. Where wrong is done the right to

seek relief is beyond the power of the commissioner. Hence it is that we assert that the assessment has been made against the complainants *without due process of law,* and that inasmuch as the laws provide for none, they are unconstitutional and void.

On the subject of taxation there is no higher authority than Mr. Cooley. In regard to the necessity for notice, he says, in his work on Taxation:

> "In such proceedings, therefore, it must be a matter of the utmost importance to the person assessed that he should have some opportunity to be heard before the charge is fully established against him; and it would seem to be a dictate of strict justice that the law should make reasonable provision to secure him, as far as may be, against partiality, malice or oppression."

And from page 266 we quote as follows:

> "We should say that notice of proceedings in such cases, and an opportunity for a hearing of some description, were matters of constitutional right. It has been customary to provide for them as a part of what is 'due process of law' for these cases; *and it is not to be assumed that constitutional provisions, carefully framed for the protection of property, were intended or could be construed to sanction legislation under which officers might secretly assess one for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment.* It has often been very pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned, unheard; and it has also been justly observed of taxing officers, that 'it would be a dangerous precedent to hold that any absolute power resides in them to tax as they may choose without giving any notice to the owner. It is a power liable to great abuse,' and it might safely have been added, it is a power that under such circumstances would be certain to be abused. The general principles of law applicable to such tribunals oppose the exercise of any such power. This being the case, it is not to be supposed that the Legislature in any doubtful language has undertaken to confer it. All reasonable presumptions in construction should favor justice and right."

Then in Note 2, on page 267:

> "In the case in 7 Conn. 550, the assessment was held void because an abstract thereof which the law required should be

filed by the first of December, was actually not filed until the 20th, though this was ten days before the meeting of the board of review. That the tax-payer must take notice of the general law fixing the time and place of hearing, see *Methodist Pr. Church* v. *Baltimore*, 6 Gill, 391; *O'Neal* v. *Bridge Co.*, 18 Md. 1, 26."

A very admirable statement of the principle in regard to notice is given by the Supreme Court of California in *The People* v. *Pittsburg R. R. Co.*, 67 Cal. 625 (1885).

That court says:

> "It is not within the power of the Legislature to provide for arbitrary assessments to be made without *notice or opportunity* to appear before a board of equalization to have the assessment equalized or discharged. Such attempts to make an assessment *would not constitute due process of law.* It is violative both of the constitution of the State of California and of the 14th amendment to the Constitution of the United States."

To the same effect is the language of the court in *Mulligan* v. *Smith*, 8 Pacific Coast Law Journal, 499.

> "The legislature has no power to take away any man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him and for a full opportunity of time, place and tribunal to be heard in defense of his rights.
>
> "This constitutional guaranty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature."

In the case of *Violett* v. *Alexandria*, 92d Va. 561, in which this question was under consideration, the court, on page 561, says:

> "Due process of law requires that a person shall *have reasonable notice*, and a *reasonable opportunity* to be heard, before an impartial tribunal, before any binding decree can be made affecting his rights to liberty or property."

On page 570, holding the assessment void, the court concurs in the opinion in the case of *Stuart* v. *Palmer*, as follows:

"The opinion of the court of appeals of New York, by Judge Earl as stated, held the act unconstitutional; that the assessment and lien thereof was void, and vacated and set it aside *because it was made, levied and confirmed without any notice to the plaintiff, or other property owners affected by it; and that, as the act required no notice, and a provision for notice could not be implied, it was in effect to deprive the owner of his property without due process of law. A great number of authorities are cited to sustain this conclusion.*"

And on page 572 says as follows:

"*Due process of law* requires that he (the land owner) shall have a chance to interpose objection to the validity of the tax, or to the contention that his land is liable for it, or to the manner of assessing or collecting it, at some stage of the proceedings, before his property is irrevocably gone, and before some authority competent to afford relief in case of invalidity or injustice. Black on Taxation, in note to case of *Read* v. *Durgess*, 8 C. C. A. 398."

On page 574: repeats the language of *Stuart* v. *Palmer* as to the necessity of providing in the law for a hearing by the property owner.

On page 575 states the law as follows:

"Upon this question I am of the opinion that where a statute, *i. e.*, the charter of a municipal corporation, authorizes an assessment of any part of the costs and expenses of opening, extending, grading or otherwise improving the streets or side-walks of such corporation, upon the lands or lots abutting on the street opened, extended, graded, or otherwise improved, without providing for a notice to the person whose property may be affected by the assessment, giving such person an opportunity to appear and contest the legality, justness and correctness of the assessment at some stage in the proceedings before the assessment becomes final, such statute is in conflict with the fourteenth amendment to the Constitution of the United States, and that an assessment made thereunder is void, and creates no lien upon his property."

We will not attempt to cite a long list of authorities on this well settled question, as the authorities on this subject are so

fully reviewed and quoted from in the cases of *Violett* v. *Alexandria,* 92d Va., and *Stuart* v. *Palmer,* 74 New York, that it would be an affectation of research to recapitulate these authorities.

In the case of *Stuart* v. *Palmer,* 74 New York Reports, page 188, the judge says:

> "I am of the opinion that the Constitution sanctions no law imposing such an assessment, without a notice to and a hearing, or an opportunity of a hearing, by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. *The constitutional validity of law is to be tested, not by what has been done under it, but by what may by its authority be done.* The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice."

On page 190 it further says:

> "The Legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice older than written constitutions that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these 'without due process of law' has its foundation in this rule. *This provision is the most important guaranty of personal rights to be found in the Federal or State Constitution. It is a limitation upon arbitrary power, and it is a guaranty against arbitrary legislation.* No citizen shall arbitrarily be deprived of his life, liberty or property. This the Legislature cannot do nor authorize to be done. 'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature. (*Weimer* v. *Brueinburg,* 30 Mich., 201.)

> This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

Page 193, quoting from the opinion of Judge Gilbert in the matter of Ford, 6 Lans. 92, says:

> "That the duties of assessors in making assessments are of a judicial nature, and that 'it is a fundamental rule that in all judicial or quasi-judicial proceedings, whereby the citizen may be deprived of his property he shall have notice, and an opportunity of a hearing before the proceedings can become effectual."

On page 195:

> "No case it is believed can be found in which it was decided that this constitutional guaranty did not extend to cases of assessments, and yet we may infer from certain dicta of judges that their attention was not called to it, or that they lost sight of it, in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property within the meaning of this constitutional provision by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced not only against the real estate upon which it is a lien; but, as in this case, against the personal property of the owner also, and by it he may just as much be deprived of his property and in the same sense as the judgment debtor is deprived of his by the judgment."

The Supreme Court of Virginia, in the case of *Heth* v. *City of Radford*, 96 Va. 272, in passing upon an assessment made under the charter of the city of Radford, held that an assessment made where there was no opportunity for the person assessed being heard is void. The provision in the charter was as follows:

> Sec. 45. "The said Commissioner of the Revenue, in ascertaining the value of the real property taxable in said city, shall fix the same at the actual cash value of said

property at the time of assessment, irrespective of the value assessed for the purposes of State taxation, until the next general assessment, and the first assessment not later than July first, eighteen hundred and ninety-two; provided, however, that a board consisting of the Commissioner of the Revenue and two freeholders, shall be appointed by the Corporation Court, whose duty it shall be to assess the real estate of the city."

The court says, page 274:

"Imposing *taxes* or levies is a *taking* of property. The owner is entitled to be heard before the charge is fully established against him. If he is not afforded an opportunity to be heard upon the question of the assessment of his property for taxation, the tax or levy is unlawfully exacted of him, for otherwise he is deprived of his property without the process of law, in violation of the fourteenth amendment of the Constitution of the United States. *Violett* v. *City of Alexandria*, 92 Va. 561; *Davidson* v. *New Orleans*, 96 U. S. 97; and *Hager* v. *Reclamation District*, 111 U. S. 701.

"The necessity that provision be made for notice to the owner, and that he be afforded an opportunity to be heard in regard to the assessment of his property for taxation and the laying of taxes and levies upon it, as well as the principles which control with respect to these matters, were elaborately discussed by Judge Cardwell in the case of *Violett* v. *City of Alexandria*, *supra*, and need not be here repeated. *It is sufficient to say that where notice to the party to be affected and an opportunity for him to be heard is not provided for in the law under which the assessment is made or the taxes or levies laid, the law is unconstitutional and void, and the assessment or levy is illegal.*"

There is no provision under the statute of Virginia for the shareholder in a bank being heard or brought before any tribunal, and therefore the assessment was unconstitutional and void.

The application in the above case was that the assessment be corrected and made to conform to the State assessment for the year 1890. That being what the party asked, the court gave him all he asked.

The only provision under the laws of Virginia for the cor-

rection of erroneous assessment of taxes on personal estate is under section 567 of the Code of 1887, but the opportunity to correct assessments is only extended to such as are found on the land book or the personal property book from which the tax tickets against each person assessed are made off. In the assessment of taxes against the shareholders in banks the commissioner of the revenue simply obtains from the bank a list of the stockholders, makes his assessment, and returns it to the auditor, and the auditor then collects, or attempts to collect, from the bank or the cashier of the bank. There is no method, provided by this law, by which an assessment when made can be corrected; no notice to the stockholder, nor opportunity given him to assert his rights.

Under the laws of Virginia the shareholder in a bank is the only person who has no tribunal before which he can be heard at any time. The personal property book does not contain a list of stock and stockholders in banks, but only such other items of personal property as are required to be listed by each taxpayer upon the form furnished by the auditor of public accounts to the commissioner of the revenue, and furnished by the commissioner of the revenue to the taxpayer. See section 8, Schedule C, Acts of 1889-90, page 200; section 491, Code of 1887, and sections 504, 511, 513, 515, 520, 531, and chapter 27 of the Code of 1887.

For convenience of the court we here copy the above sections:

> "Sec. 504. From the list of persons and personal property, ascertained as aforesaid, the commissioner shall make two books, in one of which he shall place all white persons charged with capitation tax and tax on personal property, and in the other all colored persons so charged. They shall be in the form prescribed by the auditor of public accounts, and so arranged that the commissioner may set forth, in as many separate columns as may be necessary to show the persons chargeable with taxes, alphabetically arranged with reference to the first letters of each name, and opposite thereto the residence of each tax payer, the several subjects of taxation, and the value of each; and in a separate column, opposite to the names of the persons chargeable with taxes as aforesaid, shall

show the aggregate amount of taxes on all the subjects with which he has been listed. The taxable subjects shall be classified by schedule or otherwise, as the General Assembly may from time to time prescribe in the acts imposing taxes for public purposes. (Acts 1889–90, page 74. In force on and after February 22, 1900.)"

"Sec. 511. The commissioner, after completing his per-personal property book, shall make three copies thereof. At the foot of each copy he shall make and subscribe an oath to the following effect: 'I, A. B., commissioner of the revenue for the district of , in the county of (or commissioner of the revenue for the city of), do swear that in making out the original book, of which the foregoing is a correct copy, I have, to the best of my knowledge and ability, pursued the laws prescribing the duties of a commissioner of the revenue; that in every case the list of each person was rendered on oath, except those noted by me as having failed or refused to take an oath or affirmation. Given under my hand this day of eighteen hundred and . (A. B., Commissioner.)

"Sworn to before me, a justice (or other person authorized to administer oaths) for the county (or corporation) of , on the day of , eighteen hundred and .

J. P."

"Sec. 513. It shall be the duty of the commissioner to furnish to the clerk of the court of his county or corporation, by the first day of July of each year, the copies of the land and personal property books, and within twelve days after such clerk shall have received them, he shall examine the same."

"Sec. 515. He shall compare the personal property books with the lists taken by the commissioner from individuals, and examine the same in such other way as the records of his office and his information will enable him to do."

"Sec. 520. He shall retain one of said copies of each book in his office, and, without delay, return the others so examined and certified to the commissioner, one of each of which the said commissioner shall immediately deliver to the treasurer of his county or corporation, and the others transmit to the auditor of public accounts. For a failure so to deliver said copies to the clerk for examination by the time prescribed, or to the treasurer and auditor by the fifteenth day of July in each year, the commissioner shall be fined not less

than fifty nor more than two hundred dollars, and the auditor shall not pay to him his compensation; but the auditor for good cause may extend the time for any commissioner to deliver said books not exceeding thirty days."

"Sec. 531. After the commissioner of the revenue shall have delivered a copy of his land book or personal property book to the county or city treasurer, no alteration shall be made in either by him affecting the taxes or levies of that year."

Under section 491, the Code of 1887, the commissioner is required to take from each person a list of his personal property (not bank stock), and the taxpayer is required to make oath to the list.

Under section 494 the commissioner is required to furnish each person with a form or list for valuation, and the auditor of public accounts is required to furnish these blank lists of taxables with the required oath printed on the back. We have filed with our bill one of these blanks, which upon investigation the court will see could not possibly embrace shares of stock in banks.

Under section 504, the commissioner is required to make up his personal property book from these lists, signed and sworn to by the taxpayer, and which do not embrace bank shares.

Under section 511, the commissioner, after completing his personal property book, is required to make three copies, and to subscribe an oath, which states that every person made oath to the list except those where the parties failed or refused.

Under section 513, the commissioner is required by the first day of July to furnish the clerk of the county or corporation court with copies of these books, and within twelve days after the first day of July the clerk is required to examine them.

Under section 515 the clerk is required to compare the personal property book with the lists taken by the commissioner from individuals.

Under section 516 the commissioner is required to assist the clerk, and errors are to be corrected.

Under section 519 the clerk is required to certify to the treasurer of the State the aggregate of taxes and licenses.

Under section 520 the clerk is required to retain a copy of each of the books in his office and return the other copies to the commissioner. One of which the commissioner delivers to the treasurer of the county or corporation and the other to the auditor of public accounts by the 15th day of July.

Under chapter 27 the county and city treasurers are required to collect taxes shown on these books.

It needs no further demonstration to prove that shares of stock in banks are not to be put on the personal property book, but we call the attention of the court to the fact that under section 17 the commissioner is required, during the month of May, to assess the value of bank stock as of the first of February, and during the same month to deliver this assessment to the auditor of public accounts, and thereupon by the first of June, the banks are required to pay the taxes so assessed into the treasury. If such tax be not paid within thirty days after the assessment of the said shares (not after delivery to the auditor of the assessment) suit is authorized against the cashier and his sureties.

Under section 490 of the Code, in assessing personal property which is to be put on the personal property book, the commissioner has to begin on February first (see sections 490 and 491); and under section 513 he is to complete his books by the first of July, but under section 520 he is not required to deliver them to the county treasurer or auditor before the 15th day of July. So not only are the banks required to pay the tax on bank shares by the first of June, but suit can be brought against the cashier before the first day of July, the day on which the personal property book is to be completed, and, even considering that the thirty days after the assessment begin on the first day of June, the thirty days would expire certainly fifteen days before the personal property book is required to be delivered to the treasurer of the county or corporation and the auditor of public accounts. So this in addition makes it perfectly clear that it was never contemplated that the assessment of bank shares should be entered on the personal property book.

"Sec. 490. When commissioners begin to take lists of persons and property.—Each commissioner shall begin annually, on the first day of February, unless otherwise directed by the auditor, to discharge the duties prescribed by the following section:

"Sec. 491. What persons and property to be listed for taxation; how beginners in business assessed; tax-payers to give in lists and make oath thereto; how assessment made when a person refuses to furnish list.—The commissioner shall ascertain and assess all the personal property not exempt from taxation, and all subjects of taxation in his county, district, or city, on the said first day of February in each year, and also all male persons of full age and of sound mind residing therein, on that day, and herein shall be included all persons and property removed from one county, district, or city to another, between the said first day of February and the day on which the commissioner may deliver his books to the officer charged with the collection of taxes; but persons or property assessed in one county, district, or city shall not be assessed in any other for that year: provided that any person beginning any trade or business after the first day of February of any year, shall be assessed, from the date of the beginning, upon the capital used or intended to be used by him in carrying on such trade or business, the same to be ascertained as hereinafter provided, and the tax thereon shall bear such proportion to the whole annual tax as the space of time between the assessment of the same and the first day of February bears to a full year: provided further, that the money invested in said business shall not be twice taxed as capital for the same year in the same county or city. It shall be his duty to call on every person in his county, district, or city, to furnish a list of such property, money, credits, or other subject of taxation as required by law, and the value thereof. Upon neglect or refusal to give such list, the commissioner, in order to obtain the same, may apply to any officer of this State, or to any officer or agent of a company or firm, or to any person having knowledge thereof, or interested therein, to furnish any information such person may have relating thereto. It shall be the duty of the commissioner, in all cases to administer an oath to any such person to make true answers to such questions as he may ask in relation to any matter about which he is authorized to inquire; and if the same be the person assessed with taxes on the property, the

oath shall be as prescribed in section four hundred and ninety-four. A commissioner failing to administer the oath required shall forfeit fifty dollars."

"Sec. 494. Commissioners to furnish forms to tax-payers; oath thereto.—The commissioner shall furnish, or cause to be furnished, to each person, forms or lists for valuation, and such person shall, within ten days thereafter, make out and deliver to the commissioner, or deposit with the clerk of the county or corporation court, statements of all personal estate, moneys, contracts and credits, which such person is required by this chapter to list, and of all subjects and persons on account of which he is chargeable with taxes. The person who receives such form shall take and subscribe an oath, to be appended to such statement, to the following effect, namely: 'I do solemnly swear that to the best of my knowledge and belief the statements about to be made out by me shall contain accurate, full and complete lists of all personal estate, moneys, credits and capital, whether the same are in or out of the State, which I am required to list, and of all subjects and persons on account of which I am chargeable with taxes. So help me God.' The auditor shall furnish to the commissioner the blank list of taxables, with the required oath printed on the back, which said oath shall be taken before the commissioner, or some other person authorized to administer oaths; and it shall be signed by the tax-payer; and where the person gives in the list for another, he shall make and sign the oath as if he were acting for himself. The lists so taken shall be delivered to the commissioner and filed with the clerk of the county or corporation court, who shall examine the books to ascertain that they are so filed.

"Sec. 567. Redress against erroneous assessment of taxes. Any person assessed with taxes, aggrieved by an entry in either the land book or the personal property book, may, within two years after the delivery of such book to the treasurer, and any person assessed with a license tax, aggrieved thereby, may, within one year after such assessment apply for relief to the court in which the commissioner gave bond and qualified, or to which or to whose clerk such bond and the certificate of his qualification were returned. The attorney for the commonwealth shall defend the application; and no order made in favor of the applicant shall have any validity unless it is stated therein that such attorney did so defend; that the commissioner making the assessment, or his successor,

was examined as a witness touching the application; and the facts proved be certified."

An examination of the Code, and especially of the sections quoted, shows that the *first* step in the assessment of personal property is a list of the same made out and sworn to by the taxpayer; the *second* is the recording a list of such property on the personal property book by the commissioner of the revenue; the *third*, the testing of the accuracy of the book by the clerk of the court by comparing it with the list signed by the taxpayer; *fourth*, the delivery of a copy of the personal property book by the commissioner of the revenue, after it has been certified by the clerk, to the treasurer of the county, and another to the auditor of public accounts, and the *fifth*, the collection of all of the revenue of the state or county listed on the land and personal property book by the treasurer.

But in assessing the shares of stock in banks under section 17 the commissioner of the revenue, after assessing, makes his returns direct to the auditor, and the taxes are collected of banks by the auditor of public accounts, so there is no provision in our statute under which the taxpayer can either appear before the commissioner of the revenue, when he assesses his stock, nor is there any provision for his having the assessment corrected in court.

There is another view which clarifies the point involved, namely, *an assessor is a judicial officer*, so far as his assessments are concerned; being a judicial officer he can take no jurisdiction affecting property or liberty without notice of some character to the person interested. As has been well said, the subject of assessments belongs to a class of judicial proceedings, in which it is not necessary to formally proceed against the parties defendant as in other judicial proceedings, but it may be done in any mode provided by statute, which will give notice of a time and place when and where the parties may be heard. There must be some notice.

As to the judicial character of an assessor, see Cooley on Taxation, p. 550-1-2-3-4, where the subject is admirably treated.

In discussing the question as to whether an assessor is liable to suit by the party assessed, it is universally laid down that he is not, because he is acting as a *judicial officer,* and even though he be prompted by malice (p. 556) he is not responsible, as it is against public policy that a judicial officer should be under the apprehension of suits when he is discharging the judicial function of assessing the value of property.

Burroughs on Taxation, page 238, section 102, says:

> "Where assessors have jurisdiction of the person or property assessed, they act judicially, and like the judgments of any other tribunal, their acts are conclusive until reversed in the mode prescribed by law. Whether the error be in the valuation of property at too high a rate, or upon a wrong principle, or of property which is claimed as exempt, *the decision of the assessors cannot be attacked collaterally.* The remedy is by appeal to that tribunal provided by statute, and if there be none provided, then it is by *certiorari.*"

This court has in several cases stated that an assessment was a judicial act.

Stanley v. *Supervisors of Albany,* 121 U. S. Reports, p. 550:

> "To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. *Their action is judicial in its character.* They pass judgment on the value of the property upon personal examination and evidence respecting it. *Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by the statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment cannot be recovered back in an action at law any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed.*"

The same doctrine is laid down in *Barhyte* v. *Shepherd,* 35 New York, page 252; Am. and Eng. Encyclopædia of Law, volume 25, page 236:

> "Where the assessors have jurisdiction both of the person and of the subject matter, namely, the property assessed, their

acts partake of a judicial character, and though their determination may be subject to appeal or review, *they cannot be attacked collaterally.*"

In the case of *Hager* v. *Reclamation District*, 111 U. S., p. 710, the court says:

"But where a tax is levied on property not specifically but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. *The officers in estimating the value act judicially;* and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of assessments. The law in prescribing the time when such complaints will be heard gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax is not paid, by a sale of the delinquent's property, is due process of law.

"In some States, instead of a board of revision or equalization the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the tax payer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law."

In cases of this sort, however, revision by a court is prescribed by law as a part of the assessment.

In the taxation of shares of stock in banks under the Virginia statute no opportunity is given to the shareholders before the commissioner of the revenue, nor is there any board of equalization, nor other tribunal before which the stockholder is permitted to be heard; no time fixed for hearing it; no open court for his relief.

Kuntz v. *Sumption* (117 Indiana), 2 L. R. A. 655 is a very strong case on this question, from which we make the following quotations applicable to these cases:

(p. 656) "We do not affirm that the provisions of the statute conferring authority upon the county board to change

the general levy are invalid, nor do we affirm that they are invalid in so far as they confer authority to make orders affecting the tax payers generally. We do, however, affirm that they are invalid in so far as they assume to confer authority upon the board to conclusively change the valuation placed upon property by an individual tax payer, or to add property to his list. We are satisfied that the statute is in conflict with the Constitution, for the reason that it assumes to confer authority upon the board to add to a citizen's taxes without giving him an opportunity to be heard, and thus denies him due process of law."

. . . . . .

(p. 636) "The statute does not provide for notice to tax-payers whose taxes it is proposed to increase; and this infirmity destroys it in so far as it affects such citizens. It is not enough that in fact the tax-payer does have some notice or information, for the law must provide for notice or else no legal notice can be given. A man may be subpœnaed as a witness in an action pending against him, but unless he is summoned or notified as a party under some law authorizing a summons or a notice the proceedings are utterly void. A man may be served with a written notice that a petition for a ditch is pending, but, if there is no law authorizing notice, it will be unavailing. *A notice not authorized by law is in legal contemplation no notice.* We do not assert that the proceedings would be void where there is some notice, although not given in strict conformity to law; for we know that a defective notice, assumed to be given under a statute, will be sufficient to uphold jurisdiction as against collateral attack.

"*But there must be an assumption of the right to give notice, and there must be some law authorizing this assumption.* At all events there must be color of right, and without a law authorizing notice there can be none."

. . . . . .

(p. 657) "We affirm, too, that whether the notice is by publication or by personal service, it will sustain jurisdiction, provided there is back of it some law providing for notice. While affirming these various propositions, we also affirm that, where individual property rights are affected, there must be provision for notice made by law before there can be a final and conclusive adjudication. Only the law can prescribe the form of the notice, and the law must provide for it.

> Where, therefore, individual rights are concerned, and the matter is one upon which a party is entitled to be heard, a proceeding conclusively and finally disposing of individual property rights *will be void, unless founded upon a law providing for notice of some kind.*

But it may be said that the return to the commissioner of the list of stockholders and the market value of the stock, provided in the amendment to section 17 on the 3d of March, 1896, was equivalent to a notice by due process of law. The remarks of Mr. Justice Field in the railroad tax cases, 13 Fed. Reporter, 150, are in point as to this question. He says:

> "The presentation to the State board by the corporation of a statement of its property and of its value which it is required to furnish, is not the equivalent to a notice of the assessment made and an opportunity to be heard thereon. It is a preliminary proceeding, and until the assessment the corporation cannot know whether it will have good cause of complaint. No hearing upon the statement is allowed, and when the assessment is made the matter is closed; no opportunity to correct any errors committed is provided. The presentation of the statement can no more supersede the necessity of allowing a subsequent hearing of the owners than the filing of a complaint in court can dispense with the right of the suitor and his contestant to be then heard."

Continuing on page 752, the court says, in the discussion of the question of notice:

> "Due process of law in the proceeding is deemed to be pursued when, after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity at time and place to be designated to be heard respecting the correctness of the assessment, and to show any errors in the valuation committed by the officers. Notice to him will be sufficient if the time and place of hearing be designated by statute. But whatever the character of proceeding, whether judicial or administrative, summary or protracted, and whether it takes property directly or creates a charge or liability which may be the basis of taking it, *the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity*

to be heard, or the proceedings will want the essential ingredient of due process of law.

"Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensible to the validity of the proceeding."

8 Sawyer, 274; 13 Fed. Rep. 752.

In the case of *Paulsen* v. *Portland,* 149 U. S., page 40, the court says:

"By the same ordinance that city also provided that the cost of the sewer should be distributed upon the property within the sewer district, and appointed viewers to estimate the proportionate share which each piece of property should bear. Here, for the first time in proceedings of this nature, where an attempt is made to cast upon his particular property a certain proportion of the burdens of the cost, the tax payer has a right to be heard. The ordinance named a place at which the viewers should meet, directed that they should hold stated meetings at that place, and that all persons interested might appear and be heard by them in the matter of making the estimate. The viewers upon their appointment, gave notice by publication in the official paper of the city of the time of their first meeting. Notice by publication is a sufficient notice in proceedings of this nature. As the form of the notice and the time of its publication are not affirmatively disclosed in the complaint, it must be assumed that there was no defect in respect to these matters. The precise objection is, that although proper and sufficient notice may have been given, it was not in terms prescribed by the ordinance appointing the viewers. But, as held by the Supreme Court of Oregon in the case referred to, *Minard* v. *Douglas Co.*, 9 Oregon, 206, that which is implied in a statute is as much a part of it as that which is expressed; and where a statute or an ordinance provides for stated meetings of a board, designates the place at which the meetings are to be held, and directs that all persons interested in the matter may be heard before it, it is, as said by Judge Strahan, not a strained interpretation that it is implied thereby that some suitable notice shall be given to the parties interested.

"But, further, the viewers made formal report to the council of what they had done, stating that they had, in accordance with the requirements of ordinance 5068, given

> notice by publication, and the council in the subsequent ordinance 5162, recites that their report is satisfactory and adopted. In other words, the council by this latter ordinance approved the construction placed by the viewers upon the first, to the effect that it required notice. It would seem that when notice was in fact given, notice whose sufficiency is not challenged, a construction put by the council upon the scope and effect of its own ordinance should be entitled to respect in any challenge of the regularity of the proceedings had under that ordinance. It is settled that if provision is made 'for notice and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon this land, there is no taking of his property without due process of law."

If an opportunity to the taxpayer who is being assessed to be heard was not a prerequisite to the assessment, then this discussion of the matter was entirely superfluous, and the court would have made short work by simply stating that the assessment was valid, without any notice or an opportunity to the taxpayer to be heard. See also the opinion of the court, on page 42.

In *Palmer* v. *McMahon,* 133 U. S. 669, the court held:

> "The power to tax belongs exclusively to the legislative branch of the government, and when the law provides for a mode of *confirming or contesting the charge imposed,* with such notice to the person as is appropriate to the nature of the case, the assessment cannot be said to deprive the owner of his property without due process of law.
>
> "The imposition of taxes is in its nature administrative and not judicial, but assessors cannot exercise *quasi* judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value.
>
> "It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made."

The Supreme Court of Appeals of Virginia has again considered the subject in the case of the *City of Norfolk* v. *Young,* volume 34, Southeastern Reporter, page 886, where it cites with

approval the case of the *County of Santa Clara* v. *The Southern Pacific Railway Company,* 18 Federal Reporter, 410.

The result of these decisions is to declare that where property has to be valued for taxation the assessor acts in a judicial capacity, and there must be *provided by the statute,* imposing the tax, an opportunity to the taxpayer to be heard upon the question of valuation, otherwise, the assessment is void, because the property is taken without due process of law.

To prevent confusion there are several matters to which attention should be called.

First—Where the law itself, as in the case of a license or other such tax, fixes the exact amount of the tax to be paid, there is no occasion for notice. The law fixes the terms upon which persons can enter into the business, and this notice is given by the law itself.

Second—Notice may be given in various ways; by publication, stating the time and place, and the officer before whom the taxpayer can appear to protect himself in the ascertainment and valuation of his property; or the law itself may designate the time and place and the officer before whom the taxpayer is to appear; and as everyone is presumed to know the law, notice is brought home to him.

Third—If the officer and time are designated in the law, and the officer has a place of business fixed by it, the place so fixed becomes a part of the law. Thus where the law provides that suits shall be brought in a certain court, the court house being prescribed as the place for the judge to sit, all persons sued have notice of the place where they must appear. Hence if one gives notice that at the next term of the circuit court in the city of Richmond he will ask judgment against A for $500, A knows by the operation of the law that the place at which the circuit court sits will be the circuit court room in the city of Richmond. So if the taxpayer is to be heard by the auditor of public accounts, the auditor of public accounts having his official place of business fixed by law, all that would be necessary after designating the auditor as the person to hear complaints, would be to designate the time when he would hear.

We call the court's attention to this because many of the cases discussing this question do not advert to the distinction, and without careful reading to ascertain the exact facts of the case they mislead.

The general system in Virginia, except as to bank stock, as in many other States, is to give the taxpayer an opportunity to be heard at the time and place of the original assessment, to which he is a party, as heretofore shown. But in some States the original assessment is simply what may be called provisional, and after this provisional assessment and the tax ticket is placed in the hands of the collector, the law provides that the taxpayer may appear before some tribunal, generally a court, and have any injury done him corrected. This is due process of law because the original assessment is only provisional, and there is full provision made for a hearing where the taxpayer has his day in court. The States have it in their power to adopt any system or method of assessment which they may deem proper, provided always that, as said by the Supreme Court of Virginia, in the case cited above, notice of the time and place of assessment be secured to the taxpayer.

The best analysis of this matter we have seen is in the opinion of Judge Fields, in *County of Santa Clara* v. *Southern Pacific Railway Company,* 18 Fed. Reporter, 385, on page 409, in which he says:

> (p. 409) "In the argument of counsel, the distinction between taxes for license and franchises, and taxation upon values, seems to have been overlooked, and because no notice is required in the former case, and no opportunity given to be heard, therefore it is contended that the rule is not sound; that notice is necessary, and an opportunity of being heard in the latter case where an assessment is made upon property and values are found upon evidence; yet the distinction is plain and everywhere recognized. A license tax paid by an insurance company of another State, in order to exercise its corporate powers in this State, is the consideration given for a privilege which the company may or may not take; if taken the fee must be paid. Of course, no notice there is necessary. If a person wishes a license to do business at a

particular place, or of a particular kind, such as selling liquor, cigars, clothes, or keeping a restaurant or hotel in a city, he is only to pay what the law requires and go into the business. Notice in such cases would be of no service to him, and no hearing could change the result. And the State may exact the payment of a particular sum—such as it deems proper—as a condition of the grant of corporate powers, or for their continuance, and may reserve the right to alter this condition as it may choose; or rather, the State might have exercised such power and made such exaction had she not by her constitution declared that franchises should be assessed and taxed as property, according to their value. But for this provision no notice could be required of the amount demanded for the privilege granted, nor opportunity of being heard respecting it; for notice or hearing could be of no service to the company. Here we are not considering the compensation to be paid for franchises or privileges of any kind, whether designated as taxes or license fees, but of taxation upon values. Where these are to be ascertained, and evidence is to be taken for that purpose, and a determination is to be made which is judicial in its character, there the owner must in some form—in some tribunal—have an opportunity afforded him to be heard respecting the proceeding under which his property may be taken before such proceeding becomes final and the valuation is irevocably fixed. And in such cases there can be no valid deprivation of his property without it."

"The notice to which we refer need not be a personal citation; it is sufficient if it be given by a law designating the time and place where parties may contest the justice of the valuation. As a general rule, only a statutory notice is given. The State may designate the kind of notice and the manner in which it shall be given. All that we assert, or have asserted, is that there must be a notice of some kind which will call the attention of the parties to the subject, and inform them when and where they will be permitted to expose any alleged wrong in the valuation of which they may complain. It was with reference to the class of cases where values are to be found upon evidence, that we said in the *San Mateo Suit* that notice and opportunity to be heard were essential to the validity of the assessment, and without which the proceeding by which the tax-payer's property was taken from him would not be due process of law. We have heard

nothing in the argument of the present cases or in the criticism of the authorities which in the slightest degree effects the accuracy of the statement."

. . . . . .

"The suggestion of counsel that there is a difference in the law as to notice and opportunity of being heard, where an assessment is made for local purposes, and where it is made under a statute providing revenue for the State, is without foundation. Taxation for local improvements, or for city, county or town purposes, involves the exercise of the same power which is exerted in taxation for State or general purposes. It is the sovereign power of the State in both cases which authorizes the tax, whether that power be exerted directly by an act of the Legislature or by a municipal body as an instrumentality of the State. 'That these assessments,' says Cooley, speaking of such as are special, 'are an exercise of the taxing power, has over and over again been affirmed, until the controversy may be regarded as closed.' And this statement is supported in a note to his treatise by a reference to numerous adjudged cases (p. 430).

"The object, both of taxation for general purposes and of assessments for local purposes, is to raise money. In both cases property is valued and a certain proportion of the valuation taken for the designated purpose. Whether that purpose be general or local it in no respect changes the essential character of the proceeding. The property from which the exaction is to be made is less extensive in the one case than in the other. But in both there must be evidence of its value, and a judicial determination respecting it. And the fact that in cases of local improvements there is sometimes a consideration also of the benefits to be received, takes nothing from the judicial character of the proceeding.

"The clause of the constitution which forbids deprivation of property without due process of law, places liberty under the same guaranty, and no one can be deprived of either—property or liberty—under the name of taxation, any more than under any other name, by officers of the State, without some notice of their proceedings, and a right to be heard respecting their determination before it is executed."

. . . . . .

"In the assessment of property of the defendants—railroad companies—the mortgages thereon were not deducted, but the whole value of the property, notwithstanding the

mortgages thereon, was assessed, and the property taxed according to such assessment, to those companies. Held, (1) treating the mortgages as transferring a taxable interest in the property, that in assessing against the company the interests with which they had at the time parted by their mortgages, and taxing them upon that assessment, was a proceeding to take property of the companies without due process of law; and, (2) treating the mortgages as a lien or incumbrance upon the property, that by not deducting their amount in the assessment of the value of the property of the railroad companies for taxation, as is done in the valuation of property of natural persons, when subject to a mortgage, there was a discrimination against the companies, which resulted in imposing a greater burden upon their property than is imposed upon the property of natural persons."

The statute of California, giving an opportunity to the tax-payer to contest his assessment, is referred to by Judge Sawyer, in his opinion, on p. 421, as follows:

"And in all cases of taxes under the Constitution of California except where the assessment is made by the state board of equalization, the assessment is first made by the assessor, and the tax-payer may afterwards, on a proper petition, have the action of the assessor reviewed by the board of equalization, and thus have an opportunity to be heard before his property is finally appropriated; yet if he does not apply for such review, the tax levy becomes final and conclusive, and will be collected in the ordinary way by seizure and sale, or such other means as may be provided."

Wells County et al. v. *Gruver et al.* (Supreme Court of Indiana, June, 1888), 17 N. E. Rep. 290, at p. 292:

"The appellant's counsel are undoubtedly right in asserting that a tax-payer who seeks an injunction against the collection of a tax which is illegal only in part must pay or tender the part which he concedes to be legal.

. . . . . .

"But, while we assert the rule, we deny its application in this case. Here the plaintiff denies that any part of the assessment levied in June, 1864, is valid. She affirms, and the facts she pleads sustain her affirmation, *that all of that assessment is void.* She concedes nothing as to that assessment.

> On the contrary, her assault is directed against it as an entirety. Nor does the attack rest upon the theory that there was merely some irregularity in the proceedings of the officers. The theory of the attack is that the assessment of 1884 was utterly void because there was an entire absence of jurisdiction. The appellee strikes successfully at the foundation, and proves the invalidity of the entire assessment. She overthrows the proceeding from beginning to end. The case, be it remembered, is not that of errors occurring after the acquisition of jurisdiction, but of an attempt to proceed where, in law, there was no authority to move a single step."
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> (p. 294): "Where a tax is levied in a case where there is no jurisdiction, no debt or charge is created against the tax-payer. . . . . Where there is an entire want of authority to levy the tax sought to be collected, the tax-payer neither owes a debt nor is subject to the charge."

A striking illustration that there is no occasion for notice when there is no valuation, no judicial action, as in licenses, or other tax fixed by law without reference to value, is found in two cases decided by this court.

In the case of *Bell's Gap Railroad Company* v. *Pennsylvania,* 134 U. S., where the bonds of corporations were taxed three mills on the nominal value. This was the State system of taxation. There was no valuation, no judicial act, whether a $100 bond was worth $10 or $1,000, the tax was the same. If no interest was paid no tax was paid, but if paid the law fixed the amount. If the legislature taxed every horse at fifty cents, no notice to the taxpayer would be required, as there is no valuation, no judicial ascertainment of value by an official.

In the absence of restriction by the State Constitution, the legislature adopts such system as it deems proper, but if it adopts a system which involves valuation, judicial or quasi judicial, then notice to the taxpayer is required, and without notice, or rather an opportunity to be heard and contest the assessment, it is in contravention of the Constitution of the United States and void because assessment is without due process of law.

In the case of *National Bank* v. *Commonwealth*, 9 Wall. 353, Kentucky taxed each share of $100 in any bank fifty cents a share, without reference to the value; in other words, a fixed charge and no valuation. There was no occasion for process, as there was nothing upon which the shareholder could be heard. There was no question of discrimination before the court, as that question did not appear to have been raised in the State court, and therefore was not before this court.

It must be remembered, and we cheerfully admit, that the power of taxation is vested in the legislature, and it is not necessary that it should be exercised through the courts of justice, or that the parties upon whom the taxes are assessed shall be impleaded in a court of record through the medium of ordinary summons. It is enough that the law shall "provide for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate to the nature of the case." If it does this, then "the assessment cannot be said to deprive the owner of his property without due process of law."

The above is the language of the court in the case of *Palmer* v. *McMahon*, 133 U. S. 669, and the court adds the following pregnant sentence, which applies to the case at bar perfectly:

> "The imposition of taxes is in its nature administrative and not judicial, *but assessors exercise quasi judicial powers in arriving at value*, and opportunity to be heard should be, and is, given under all just systems of taxation, according to value.
>
> "It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made. *Hagar* v. *Reclamation District*, 111 U. S. 701, 710.
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> "The law of New York gave opportunity for objection before the tax commissioners, Laws of New York, 1859, c. 302, sec. 10, p. 681, and the plaintiff in error appeared and obtained a large deduction from the original valuation. If dissatisfied with the final action of the commissioners, he could have had that action reviewed on *certiorari*. Laws of New York, 1859, c. 302, sec. 20, p. 684; *People* v. *Commissioners*, 4 Wall. 244."

Now, in the case at bar, your Honors will perceive that no single one of the elements constituting due process of law, stated as essential in so many of the opinions of the courts, heretofore cited, was allowed to the taxpayer in Virginia on bank stock.

Under the law which we are bringing in question, he was not notified when or where the assessment was to be made, or when or where the tax was to be paid, nor did he have knowledge of the amount of the valuation. He could only presume the amount of the tax from his knowledge of the general rate fixed by the law of the State. Under no circumstances was he given the opportunity to protest against, to resist, or to review the action of the commissioner who, under this law, was to make the assessment and send it to the auditor that payment might be demanded by the auditor from the bank in which the taxpayer was a shareholder.

In the case of *Bell's Gap Railroad Company* v. *Pennsylvania*, 134 U. S. 239, it was held that in that particular case the assessment was made by due process of law, but your Honors will note that in that case there was nothing uncertain. The tax was fixed at three mills on the face, and the assessment was placed only upon such interest as had accrued upon the bonds, and the railroad company was only required to pay the tax of three mills out of such interest as might be in its hands *belonging to the taxpayer*. It required no further process of law because every element of the assessment was fixed and certain and known to the taxpayer. He had but to make a very small calculation to be made aware of the amount of the tax due, and he knew whether or not it was to be paid, for as the court said in that case, where the interest was not paid he was to pay no tax.

We rely upon this decision as approving by contrast the illegality and injustice of the law of which we now make complaint.

ACT VOID UNDER CONSTITUTION OF VIRGINIA.

But section 17 of the Acts of 1889-90, page 205, hereinbefore quoted, is in violation of article 10, section 16, of the Constitution of Virginia, which is as follows:

> "Every law which imposes, continues or revives a tax, shall distinctly state the tax, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object."

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Said section 17 in no respect complies with this constitutional provision. Begin on page 198 of the act, section 2 provides a tax on real estate, and states:

> "There shall be a tax of thirty cents on every one hundred dollars of the assessed value thereof, the proceeds of which shall be applied to the support of the government, and a further tax of ten cents for every one hundred dollars of the assessed value thereof, which shall be applied to the support of the public free schools of the state."

Schedule A, section 4, provides for a poll tax of one dollar, and section 5 applies that poll tax for public free school purposes.

Schedule B designates various kinds of personal property which shall be taxed, and section 7 has the same provision as to the amount of the tax and its application, as is provided in section 2.

Schedule C has another classification of personal property, and section 9 has the same provision for the amount of the tax and its application as in section 2.

Schedule D provides for an income tax, and section 11 provides for the amount of the tax. From section 12 to section 16, inclusive, the amount of the tax on wills, deeds, etc., respectively, is fixed. Section 17 then has no provision for the amount of the tax, nor for its application; in fact, it nowhere provides what the tax shall be, nor the object to which it is to be applied. But this is clearly seen from the foregoing statement of a provision, following nearly all of the different classifications of property, which provides the amount of tax and the purpose for which it is to be applied. So this act, assessing the shares of stock in national banks, is clearly unconstitutional and void.

This is the only defect in the taxation of shares of national bank stock which is cured by the act, approved March 3d, 1896.

Acts 1895-6, p. 727, amending and re-enacting said section 17. This section so amended is subject to the same objection for discrimination, in not allowing a deduction of debts nor the deduction of real estate, which previously existed in this section, and is subject to the same constitutional objection for providing no notice or hearing for the shareholder, either before the commissioner of the revenue or the court.

It is proper to say that under the decision of *Iverson Brown's case*, 91 Va. 762, probably the title of the act of 1889-90 is sufficient to state the object of the tax, but nowhere is the tax stated.

THE DEFENDANT'S DEMURRER.

He claims:

First—That the court has no jurisdiction.

To this we say that there are a number of cases, many of which are referred to in the foregoing brief, in which the court, indeed, in which this particular court, has taken jurisdiction under circumstances exactly parallel with those at bar, and it is impossible to imagine that where every species of defense which the ingenuity of counsel could devise has been utilized, that it can remain for this day and hour to discover for the first time that the court has no jurisdiction.

The Circuit Court, in the case of *The First National Bank of Richmond* v. *City of Richmond*, 39 Fed. Rep. 309, said that "the jurisdiction of the United States Court of Equity in matters of this character is too plain to be questioned." We refer upon this point to the case of the *Mercantile National Bank* v. *New York*, 121 U. S. 138, and *Newark Banking Company* v. *Newark*, Ib. 163, and to this list we might add a number of other cases.

We do not deny that the national bank, and its several stockholders are separate entities and we expressly disclaim any intention to assert the contrary.

We claim that the State is making an effort to illegally tax the shareholders of the bank and to cause it, as its agent, to collect this illegal tax from its shareholders, and that this being

the case, we have a right to use the name of the bank, and invoke the power of a federal court of equity to shield these stockholders from such illegal act on the part of the State, and to protect them from such wrong.

In *Cummings* v. *National Bank,* 101 U. S. 153, it was held:

> "When a rule or system of valuation for purposes of taxation is adopted by those whose duty it is to make the assessment, which is intended to operate unequally, in violation of the fundamental principles of the Constitution, and when this principle is applied not solely to one individual, but to a large class of individuals, or corporations, equity may properly interfere to restrain the operation of the unconstitutional exercise of power."

And the court held in the case of *Hills* v. *Exchange Bank,* 105 U. S. 319, that:

> "*A national bank may, on behalf of its stockholders, maintain a suit to enjoin the collection of a tax which has been unlawfully assessed on their shares by the State authorities.*"

The Circuit Court of the United States for Montana, in the case of *Brown* v. *French,* 80 Fed. Rep. 166, in which its powers were invoked by the receiver of a national bank to enjoin State tax which it was alleged was illegal, and where the jurisdiction was disputed as it is here, held that the receiver held a fiduciary relation, as did the bank, to the stockholder, and that he had a right to come into court and ask for an injunction to protect those stockholders against an illegal act, and in support of this view, cites the above named case of *Cummings* v. *Bank,* 101 U. S. 157, making the very application of its declaration of the law which we have done.

It is a sufficient ground to support equitable jurisdiction in these cases that an injunction is necessary to prevent a vexatious multiplicity of suits, all involving the same question, and the questions of each of such a character that they can be well settled by one suit in equity. This is stated in many of the cases, and must suggest itself to the judicial mind of the court,

even were there no decisions expressing that well known principle.

We have examined with care the decisions to which reference was made by counsel on the other side in the Circuit Court, under the first ground of demurrer. There is not a proposition contended for in any one of the cases to which reference was made which we stand here to gainsay or resist, for, as we have stated, we do not deny that the bank and its several stockholders are separate entities, nor do we deny that in cases where it is legal to do so, the capital of the corporation can be taxed in the hands of the corporation, and the shares of that capital may be taxed in the hands of individuals, and that it will not be double taxation. That is not the question that we raise.

It has been held so often that it is unnecessary to quote authority, that the capital of a national bank cannot be taxed, and it has been held equally often that the shares of that capital stock may be taxed.

The complaint made by our client is that the law of the State which undertakes to tax the shares of the stock in the hands of the individual stockholders is illegal because of the mode in which the assessment is made; that the shares so taxed are not placed upon the same footing as to rate of taxation with other moneyed capital, and that the mode of collection is not in accordance with justice and the law. On these questions, the references throw no light, nor is there one of them which directly or indirectly indicates that the court under circumstances such as those set forth above in the complainants' bill has not jurisdiction.

As to the second ground for demurrer assigned by the defendant, and the authorities quoted, we respectfully submit that we have already dealt with this question and cited cases maintaining the jurisdiction of the court in such cases, and that there is nothing in the cases cited in the demurrer which militates against the proposition laid down by us and sustained by the authorities to which we have made reference above.

In response to the third ground of demurrer, that is that no

Federal question is involved in this controversy, and that hence the Federal court has no jurisdiction, we respectfully refer to every case which we have cited, in the whole of this argument, as sustaining the allegation that the questions are almost entirely under the statutes and Constitution of the United States.

The question is whether the State of Virginia, in undertaking to assess the tax in the mode in which it has assessed it, and in undertaking to collect it in the mode in which it has undertaken to collect it, has not contravened the Constitution and laws of the United States. It is the same question which has been raised in all the cases cited, and many others of a similar character which might have been cited. In most of them the question of jurisdiction was not raised; in many of them, as in the case of the *First National Bank* v. *The City of Richmond*, the judges accept the jurisdiction as an axiomatic truth, using expressions indicating that this is their view, and we respectfully close what we have to say in regard to this ground of demurrer with the language in the case of the *First National Bank of Richmond* v. *City of Richmond, supra*, which language really applies to every point raised by the demurrer, to wit: "The jurisdiction of this court as a court of chancery to entertain this bill we have thought too plain to need discussion."

The cases cited by defendant in his demurrer do not militate against this doctrine, and there is not one of them which might not be relied upon by us to sustain our point of view.

The fourth ground of demurrer alleged by defendant is, "Because, if injured and aggrieved, the complainant stockholder has adequate and full legal and statutory remedy."

In reply to this we say that we have adopted a remedy which is adequate and complete, and which has been adopted and approved by this court and by all the Federal courts, and which when sought by the bank prevents a multiplicity of suits, which is a distinct ground of equitable jurisdiction.

Your Honors, by examining the Code of Virginia of 1887, will perceive that it does not give in such cases as that at bar "adequate and full remedy." The Code, section 567, provides:

"Any person assessed with taxes, aggrieved by an entry in either the land book or the personal property book, made within two years after the delivery of such book to the treasurer, and any person assessed with a license tax, aggrieved thereby, may, within one year after such assessment, apply for relief to the court in which the commissioner gave bond and qualified, or to which or to whose clerk such bond and the certificate of his qualification were returned. The attorney for the commonwealth shall defend the applications; and no order made in favor of the applicant shall have any validity unless it is stated therein that such attorney did so defend; that the commissioner making the assessment, or his successor, was examined as a witness touching the application; and the facts proved be certified."

It gives no remedy in these cases. It is intended for assessments made in the usual way by the commissioner of the revenue upon real and personal property, and refers to such assessments as are reported to the treasurer of the town or county wherein the property is situated.

The assessment under the law of which complaint is now made is not reported to the treasurer; it is sent by the commissioner of the revenue to the auditor. It is put upon no book in the reach of the taxpayer; he does not know when it is made, and no record of it is made anywhere which is open to his investigation. Therefore this provision of the Code in no respect applies to these cases. The fact that there is no such remedy is an additional reason why the aid of a court of equity may properly be invoked, and gives additional reason for jurisdiction to your Honors' court.

Los Angeles v. *Los Angeles Water Co.*, 177 U. S. 581; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 12; *Detroit* v. *Detroit etc. St. Ry. Co.*, 184 U. S. 379.

The fifth ground of the demurrer, as alleged by the defendant, is "because the complainant has sustained, and can sustain, no injury, damage or loss under the statutes of the Commonwealth of Virginia; said statutes impose no tax upon national banking companies, but every *such* association and company is, in terms specific and clear, exempted from State taxation."

This point has already been fully discussed. The bank has, as we have already shown, a right acknowledged by this court to invoke the aid of the court to protect its stockholders from unjust taxation, and to intervene in their behalf to prove a multiplicity of vexatious suits against each one of them, and the bank would be liable to its stockholders if it paid an illegal tax, or more tax than the stockholder entitled to deductions was liable for.

And then again, the taxes are made a lien on the shares of stock by law, and under section 17, as amended, the bank is treated as a garnishee and is entitled to ask protection. See also Pomeroy's Equity, section 243, etc.

J. D. HORSLEY, for Appellant.

"A."

CHAP. 244.—AN ACT to provide for the assessment of taxes on persons, property and incomes, and on licenses to transact business and imposing taxes thereon for the support of the government and public free schools, and to pay the interest on the public debt, and prescribing the mode of obtaining licenses to sell wine, ardent spirits, malt liquors, or any mixture thereof, in cases where a court certificate is required.

Approved March 6, 1890.

. . . . . .

TAXES ON BANKS.

Sec. 17. No tax shall be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States; but the stockholders in such banks or banking associations shall be assessed and taxed on the market value of their shares of stock therein at the same rate as is assessed upon other moneyed capital in the hands of individuals residing in this State. It shall be the duty of each commissioner of the revenue annually, during the month of May, to report to the auditor of public accounts the name of each bank or banking association doing business in his district, and the names of the officers thereof, and to assess the share or shares of each stockholder in the banks or banking associations as aforesaid at the market value thereof as of the first day of February in each year, and it shall be the duty of each of such banks or banking associations forthwith to pay into the treasury of the state the tax imposed by law upon such assessment of the shares aforesaid on or before the first day of June. If such tax be not paid within thirty days after the assessment of said shares, the cashier of the bank or banking association failing to make payment, and his sureties, shall be liable for the same, and twenty per centum upon the amount to be recovered, on motion of the auditor of public accounts, in the circuit court of the city of Richmond, upon fifteen days notice, according to the provisions of the section seven hundred and thirteen of the Code of Virginia. The real estate of all banks and banking associations shall be assessed on the land books of the commissioners of the revenue with the same taxes with which other real estate is assessed."

"B."

CHAP. 642.—AN ACT to authorize and empower the auditor of public accounts to collect taxes heretofore assessed upon bank stock held by resident and non-resident stockholders.

Approved March 3, 1896.

1. Be it enacted by the General Assembly of Virginia, that the holders of bank stock or the stock of any banking association doing business in this state, resident and non-resident, shall be assessed with the tax imposed thereon by law in the city, town or district wherein the bank or banking association is located, and said tax shall be the first lien upon said stock, no matter in whose hands found, and have priority over any and all liens by deed of trust, mortgage, bill of sale, or other assignment made by the owner, and take priority over all liens by execution, garnishment, or attachment process.

2. It shall be the duty of the auditor of public accounts, as soon as practicable after the passage of this act, to furnish the cashier of the banks or banking associations doing business in this state with a list of its stockholders heretofore assessed with taxes upon their bank stock who have not paid said tax, which list shall give the name of the stockholder, amount of tax, when assessed, and the sum total due to the commonwealth by each stockholder. The bank or banking association thus notified, should said bank or banking association so desire and elect, may pay to the auditor the tax assessed upon the stock held by its stockholders; provided payment shall be made on or before the first day of July, eighteen hundred and ninety-six.

3. But should the privilege conferred by the preceding section be declined or not availed of by the bank or banking association aforesaid, then it shall be the duty of the auditor without delay to notify the attorney general and give him a copy of the lists furnished the cashier of the bank or banking association aforesaid, and the attorney general, by motion, shall proceed to collect said taxes from the individual stockholder. This motion shall be cognizable by and made in the circuit court of Richmond city after ten days' notice to the stockholder, and may be served upon non-

resident defendants in the mode provided by section thirty-two hundred and eight of the code of Virginia.

4. This act shall be in force from its passage.

"C."

CHAP. 669.—AN ACT to amend and re-enact section 17 of an act entitled an act to provide for the assessment of taxes on persons, property, and incomes, and on licenses to transact business, and imposing taxes thereon for the support of the government and public free schools and to pay the interest on the public debt, and prescribing the mode of obtaining licenses to sell wine, ardent spirits, malt liquors, or any mixture thereof, in cases where a court certificate is required, approved March 6, 1890.

Approved March 3, 1896.

1. Be it enacted by the General Assembly of Virginia, that section seventeen of the act entitled an act to provide for the assessment of taxes on persons and property and incomes, and on licenses to transact business, and imposing taxes thereon for the support of the government and public free schools and to pay the interest on the public debt, and prescribing the mode of obtaining licenses to sell wine, ardent spirits, malt liquors, or any mixture thereof, in cases where a court certificate is required, approved March sixth, eighteen hundred and ninety, be amended and re-enacted to read as follows—namely:

Sec. 17. Taxes on Banks.—No tax shall be assessed upon the capital of any bank or banking association organized under the authority of this state or of the United States, but the stockholders in such banks or banking association shall be assessed and taxed on the market value of their shares of stock therein at the same rate that is assessed upon other moneyed capital in the hands of individuals residing in this state. Each bank or banking association aforesaid, on the first day of February in each year, shall make up and return to the commissioner of the revenue of the county, city, town, or district in which said bank or banking association is located a report, in which shall be given the names of the stockholders, the number of shares owned or held or controlled by each, the market value of said stock, and the stockholder's residence. It shall be

the duty of said commissioner of the revenue, on or after the first day of February, in each year, to assess each stockholder upon the shares of stock estimated at the market value on said first day of February in each year a tax of thirty cents on every hundred dollars' value thereof; the proceeds of which shall be applied to the support of the government, and a further tax of ten cents on every hundred dollars' value thereof, which shall be applied to the support of the public free schools of the state and make out three assessment lists, give one to the bank or banking association aforesaid, located in his county, city, town or district, and one to the auditor of public accounts, and retain one. The assessment list delivered to said bank or banking association shall be notice to the bank or banking association of the tax assessed against its stockholders and each of them, and have the legal effect and force of a summons upon suggestion formally issued and regularly served. The tax assessed upon each stockholder in said bank or banking association shall be the first lien upon the stock standing in his name and upon the dividends due and to become due thereon, no matter in whose possession found, and have priority over any and all liens by deed of trust, mortgage, bill of sale or other assignment made by the owner or holder, and take priority over all liens by execution, garnishment or attachment process sued out by creditors of the stockholder. The bank or banking association shall hold the dividend or other fund which belongs to the stockholder and in its custody at the time the assessment list is received, and that thereafter shall come under its control, for the use of the commonwealth, and apply the same to the payment of the tax assessed, and when thus applied shall be acquitted and discharged from all liability to the stockholder for the money thus disbursed; provided that after making report to the commissioner of the revenue any bank or banking institution, on or before the first day of June in each year, which shall so elect, may pay the taxes assessed against the stockholders directly to the auditor of public accounts. But should said bank or banking association fail to elect and pay into the treasury the tax assessed against its stockholders on or before the first day of June in each year, then as soon thereafter as practicable the auditor of public accounts shall transmit to the

treasurer of the county or city in which said bank or banking association is located a copy of the assessment list furnished him by the commissioner of the revenue, and it shall be said treasurer's duty to collect the taxes therein assessed, and to this end levy upon the stock of the tax-payer or so much thereof as is necessary to pay said tax, and sell the same at public auction for cash, as other chattles and personal property are sold under execution. He shall give to the purchaser a bill of sale made under his hand and seal. The bank or banking association in which such bank stock stands on presentation by a purchaser of his bill of sale shall cause the stock therein described to be transferred to said purchaser, and he shall take a clear and unencumbered title to the stock purchased. Should the taxes assessed against bank stockholders evidenced by the bills aforesaid be not paid or collected as hereinbefore provided, the lists aforesaid shall stand and be treated and have the legal effect of tax-tickets regularly made out against each of said stockholders named in said lists as to which tax the right of levy and distress had accrued to the commonwealth, and the treasurer shall proceed to collect the same by levy or distress, and possess all and singular the authority and power conferred upon him by law to collect other state taxes, and be governed by sections six hundred and twenty-two and six hundred and twenty-three of the code of Virginia. The bank or banking association which shall fail or neglect to comply with each and every provision of this act for each separate offence shall be fined not less than one hundred nor more than five hundred dollars, which fine shall be recovered upon motion, after five days' notice, in the county, circuit, corporation or hustings court of the county, city or district in which the said bank or banking association is located. Said motion shall be in the name of the commonwealth and presented by the attorney for the commonwealth of the court in which the motion is brought or made. The real estate of all banks and banking associations shall be assessed on the land books of the commissioners of the revenue with the same taxes with which other real estate is assessed.

2. This act shall be in force from its passage.

"D."

AN ACT to provide for the assessment of taxes on persons, property and incomes, and on license to transact business, and imposing taxes thereon for the support of the government and public free schools, and to pay the interest on the public debt, and prescribing the mode as obtaining license to sell wine, ardent spirits, malt liquors, or any mixture thereof, in cases where a court certificate is required.

. . . . . .

SCHEDULE C.

8. The classification and numbers under schedule C shall be as follows, to-wit:

On Personal Property in Choses in Action, Moneys, Credits, and Capital.

First. The commissioners shall require each person residing in his district, city, or town, to exhibit and make oath to a statement in the aggregate of "all bonds, notes, and other evidences of debt, due and payable to such persons, in excess of one hundred dollars, the amounts of such bonds, notes, and other evidences of debt, under one hundred dollars each, to be given in under oath, in the aggregate," the solvency of which, in cases of doubt, as well as in the value thereof, shall be determined by the said commissioner, which said list shall be signed by the commissioner and tax-payer, including bonds due from railroad and canal companies, bonds of counties, cities and towns, and bonds of other states and corporations; demands and claims, however evidenced, owing or coming to such persons, whether due or not, from debtors residing out of or within the state or country, whether secured by deed of trust or by judgment or not, deducting from the aggregate amount thereof all such bonds, demands, claims not otherwise deducted, owing to others from such person as principal debtor, and not as guarantor, endorser, or surety. The aggregate of principal, interest, and exchange shall constitute the amount of a bond, demand or claim due and payable; and the principal, with interest rebated when the amount of the bond, demand, or claim bears no interest, shall constitute the amount of the bond, demand, or claim not yet due and payable. But no bond, demand, or claim constituting a

part of the capital as defined in chapter one of this act, of a business done out of this state shall be included in this section. If any person, firm or banking association shall, with a view to evade the payment of taxes fail or refuse to give in to the commissioner of the revenue a statement of the aggregate of any bonds, notes, claims, or other evidences of debt which are subject to assessment and taxation under chapter one of this act, the same shall not be recoverable by action at law or suit in equity before any of the courts of this commonwealth, legal process or sale, under deed of trust, until they shall have been reported for assessment and the tax paid thereon, with an addition of fifty per centum per annum from the time the tax accrued; and the failure to give in the aggregate of said bonds, notes, claims, and so forth, shall be taken as *prima facie* evidence of the intention to so evade the payment of taxes.

Second. He shall ascertain from each person in his district, city or town the value of capital, including moneys, credits, or other thing remaining invested, whether said investment was made originally in this or any other state or country, and the value of all capital, loaned, used, or employed in business out of this state by himself, his agent, or other person for him.

Third. He shall ascertain the value of all capital of incorporated joint stock companies not otherwise taxed; but real estate belonging to such company shall not be held to be capital, but shall be listed and taxed as property, and not as capital.

Fourth. He shall ascertain from each person in his district, city or town the amount of capital invested, used, or employed in any trade or business not otherwise taxed. Moneys and credits actively used and employed in carrying on the trade or business, including goods, wares, and merchandise on hand, and all solvent bonds, demands, or claims made or contracted in the course of business during the preceding year, shall be held to be capital in such trade or business, and shall not be taxed otherwise than as such capital; but real estate shall not be listed as such capital, but shall be assessed and taxed as other specific property; but nothing herein shall be held to exclude from taxation any property which is the subject of such business.

Fifth. He shall ascertain from each person residing in his district, city or town the aggregate amount of money and the value of principal and interest of personal estate and credits under his control as court receiver or commissioner, in pursuance of any order, judgment, or decree of any court as agent, guardian, or other fiduciary. And it shall be the duty of the clerks of courts to furnish commissioners with a list of all evidences of debts under the control of courts, receivers, or commissioners, as evidenced by decrees of the courts.

Sixth. He shall ascertain the amount of any money and the value of any personal estate or credits deposited to the credit of any suit, and not in the hands of a receiver.

Seventh. He shall ascertain the value of all toll-bridges, turnpikes, and of ferries in his district, other than steam ferries.

Eighth. He shall ascertain from each person residing in his district, city, or town all money belonging to him on deposit to the credit of such person with any bank or other corporation or firm or person.

Taxes on Personal Property in Choses in Action, &c., and Toll-Bridges.

9. On all personal property in choses in action, &c., and toll-bridges, turnpikes, and ferries, and moneys in currency as embraced in this schedule, there shall be a tax of thirty cents on every hundred dollars' value thereof, the proceeds of which shall be applied to the payment of expenses of the government; and a further tax of ten cents on every hundred dollars of the value thereof, which shall be applied to the support of the public free schools of this state.

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In the Supreme Court of the United States.

PEOPLES NATIONAL BANK OF LYNCHBURG,
APPELLANT,

v.

MORTON MARYE, AUDITOR,
APPELLEE.

Office Supreme Court U. S.
FILED
APR 14 1903
JAMES H. McKENNEY,
Clerk.

ARGUMENT OF JOHN H. LEWIS,

(With whom are MESS. WILSON & MANSON and BLACKFORD, HORSLEY & BLACKFORD.)

Of Counsel for the Appellant.

SUBJECTS:

UNLAWFUL DISCRIMINATION IN TAXING NATIONAL BANK SHARES.

WHAT IS DUE PROCESS OF LAW; AND WHETHER IT OBTAINS IN THIS CASE?

THE JUDICIAL CHARACTER OF ASSESSMENTS.

"But where a tax is levied on property, not specifically, but according to its value to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and, in most of the States, provision is made for the correction of errors committed by them, through boards of revision, or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments."—Field, J., in *Hagar* v. *Reclamation, &c.*, 111 U. S. 710.

"The imposition of taxes is in its nature administrative and not judicial, but assessors exercise quasi *judicial powers in arriving at the value, and opportunity to be heard should be, and is, given under all just systems of taxation according to value."*—Fuller, C. J., in *Palmer* v. *McMahon*, 133 U. S., 669.

J. P. BELL CO., LYNCHBURG, VA.

In the Supreme Court of the United States.

PEOPLES NATIONAL BANK OF LYNCHBURG

v.

MORTON MARYE, AUDITOR.

ARGUMENT OF JOHN H. LEWIS,

(WITH WHOM ARE WILSON & MANSON AND BLACKFORD, HORSLEY & BLACKFORD,)

ON THE DEMURRER.

SUBJECTS:

UNLAWFUL DISCRIMINATION IN TAXING NATIONAL BANK SHARES.

WHAT IS DUE PROCESS OF LAW; AND WHETHER IT OBTAINS IN THIS CASE?

THE JUDICIAL CHARACTER OF ASSESSMENTS.

The controversy is before this Court on appeal from a decree of the Circuit Court of the United States for the Eastern District of Virginia, sustaining a Demurrer to the Bill.

I.

A STATEMENT OF THE CASE.

The Bill and Amended Bills of the Plaintiff, with appropriate jurisdictional allegations, and specially avouching the equity of avoiding multiplicity of suits, charges:

1. That its capital is $205,300, of which $28,990 is invested in real estate.

2. That the Virginia Act of Assembly of the 6th of March, 1890, Rec., pp. 1–2, undertakes to assess a tax on the complainant's stockholders' shares at a rate higher than other monied capital in the hands of individuals, constituting a material portion of the taxable objects.

3. That the Act is void under the State Constitution as not specifying the object of the tax. Va. Const. X, 16.

4. That the Act empowers the revenue commissioner to assess the said shares at *his own* estimate of the market value thereof, without fixing a time or place for his proceedings, and without notice to the plaintiff, or the shareholder whose property is taken. Acts 1889–90, p. 205; Rec., 1. (See this printed *in extenso* in the Appendix to the Argument of Mr. Horsley filed in this case).

5. That the said Act, in default payment of such assessment for thirty days, makes the complainant's Cashier and his sureties liable for it and 20 per cent. added, recoverable on fifteen days notice in the Circuit Court of Richmond, 150 miles distant.

6. That another Act of 3rd March, 1896, Acts 1895-6, p. 700, (see Appendix B to Horsley's Argument), makes an assessment on the said shares, and fixes it as a first lien.

7. That the latter Act requires the Auditor (in Richmond) to furnish the Cashier a list of stockholders *assessed under the former Act;* and gives the *bank* the right to pay the shareholders' taxes before the 1st of July, 1896; or in default, authorizes the Attorney General to proceed against the individual stockholders, after ten days notice, by motion in the Circuit Court of Richmond. *Ubi supra.*

8. That continual demand for payment has been made on the plaintiff, and refused by it, on the ground that the said Acts are unconstitutional, as violating both the Federal and State Constitutions, and the assessment and tax void.

9. That the Auditor and the Attorney General of Virginia are about to proceed to enforce collection. Rec., 6.

10. That the equity, to avoid multiplicity of suits, the tax being unconstitutional and void, may be invoked.

11. The bill gives details showing the assessment for the different years involved.

12. That a number of the complainant's shareholders are indebted, and have not otherwise deducted, and cannot otherwise deduct such indebtedness from the market value of the stock so ascertained; and such indebtedness is set forth in detail; Exhibit A, Rec., 8, 29; and that similar indebtedness under the statutes may be deducted by an investor in "other monied capital," which competes in large measure with national bank shares.

13. The tables exhibited show the relative amounts in national bank shares, and other monied capital, for the years in question, averaging $27,000,000 (for other monied capital) compared with $6,000,000 (for national banks). Exhibit A, 1, 2, etc., filed with the bill. Rec., 17, etc.

14. That there was a third Act, of the 3rd March, 1896. Rec., 26 (printed in full as Appendix C to Horsley's Argument), which purports to amend the 17th section of that of the 6th March, 1890, still allowing the revenue commissioner at will to assess when and where he pleases, without notice or opportunity for hearing; but it shifts the motion for judgment to the location of the Bank. Acts, 1895–6, p. 726.

15. That this remedies none of the defects in the preceding Acts, except that it seeks to obviate the vice of omitting the object of the tax. Va. Const. Art. X., sec. 16.

16. That each and all of the Acts mentioned are void as depriving shareholders of property without due process of law, under the 5th and 14th Amendments to the United States Constitution. Rec. 4.

II.

THE QUESTIONS RAISED.

The questions raised by the Demurrer involve the jurisdiction of the Court and the title to relief, notably:

1. Whether there is a federal question;

2. Whether, to avoid multiplicity of suits, the plaintiff can maintain the suit;

3. Whether the bill states a case for equitable relief;

4. Whether there is an illegal discrimination against national bank shares;

5. Whether the canon of equality and uniformity in taxation is violated;

6. Whether valid assessment can be made under any or all of the obnoxious statutes referred to, and specially whether due process of law is provided in any or all of them, in the absence of tribunal, knowledge and opportunity;

7. What is "other monied capital;"

8. Whether the Statutes meet the requirements of the State Constitution;

9. The rule for interpreting tax laws;

10. The judicial character of assessments;

11. The finality of assessments.

III.

SPECIFICATION OF ERRORS RELIED ON.

The errors in the decree complained of are the following:

1. The sustaining of the demurrer and supplemental demurrer to the original and amended bills.

2. The omission of the trial Court to perpetuate the injunction against demanding of, or collecting from, the plaintiff, its cashier or shareholders, the State tax of 40 cents a hundred assessed on its stock for the years 1891 to 1897, inclusive.

3. The omission to perpetuate the injunction against demanding or collecting such tax as void under the 5th and 14th Amendments of the U. S. Constitution, as without due process of law.

4. The same, as void under Art. X, sec. 16, Va. Constitution, which declares--

> "SEC. 16. Every law which imposes, continues, or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object."

5. The same, as void under Sec. I, Art. X, as follows:

> "SEC. 1. Taxation, except as hereinafter provided, whether imposed by the State, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value."

6. The same, on the ground that each of the said statutes is void as contravening Sec. 5219 of the United States Revised Statutes in taxing national bank shares at a rate higher than that on other monied capital.

7. The same, on the ground that the Acts do not permit the deduction of indebtedness from the value of national bank shares, held by the plaintiff's stockholders, as Adams, who was indebted, and had nothing else from which said indebtedness could be deducted, though the privilege obtained in respect to other monied capital. Rec., 24.

8. The same, in not decreeing that the 17th section of the Act of March 3, 1896, was invalid because obnoxious to section 1 of Art. X, Va. Constitution, quoted above, in that other monied

capital in individual hands was allowed a deduction of indebtedness under Sec. 8 of Schedule C (Acts 1889–90, p. 200), a right denied to national bank shares.

9. The same, in omitting to adjudge that the indebtedness of Adams and others, Exhibit A, should be deducted from the assessed value of the complainant's shares held by them.

10. The same, in omitting to adjudge that securities mentioned in Sec. 8, Schedule C, *supra*, compete with national bank shares, and that there is thus an invalid discrimination.

In this connection see the Assignment of Errors, Rec., 93. These will be insisted on.

IV.

THE POINTS OF LAW DISCUSSED.

The matters of law are numerous and interesting.

1.

There are many federal questions, as asserted in the bill, Rec., 4; and, as appears in the whole proceedings, the invalidity of the tax under the [redacted] 14th Amendments to the United States Constitution, its violation of section 5219, U. S. Revised Statutes, &c.

Hills v. *National Bank, &c.*, 15 Otto, 319;
Pelton v. *Commercial, &c.*, 11 Otto, 143.

2.

To avoid multiplicity of suits the plaintiff, as a *quasi* trustee, may bring the suit, the tax being void.

Cummings v. *Merchants, &c.*, 11 Otto, 153.

3.

Equities abound in the bill, such as—

(1) The inadequacy of all other remedy.

Cummings v. *Merchants, &c., Id. Ib.*

(2) The position of the plaintiff as stakeholder, its fiducial character, &c., pointed out by Mr. Justice Miller in the case last cited.

4.

There is an illegal discrimination against national bank shares in favor of a "material part" of competing capital.

First National, &c., v. *Ayer*, 160 U. S., 660.

(This subject is elaborately discussed in the Argument filed in this case by Mr. Horsley.)

5.

DUE PROCESS OF LAW.

Among the numerous vices of the Statutes of Virginia sufficient to invalidate the assessment or collection of any tax under them, the medieval machinery for assessment is most conspicuous.

Briefly stated, the whole and indisputable case, *vid. ante* p. 1, etc., is this:

> "It shall be the duty of the Commissioner of the Revenue annually during the month of May to report to the Auditor . . . the name of each bank . . . in his district, the names of the officers thereof, and to assess the . . . shares of each stockholder in the banks . . . aforesaid at the market value thereof as of the first day of February in each year."

And the bank must pay such assessment by the 1st of June.

The Commissioner may assess the 1st, 26th, 31st, at any time, day or night, Sunday, or when not, at any place, in or out of his district. In respect to all these details there is absolutely no requirement. No man can guess where his "Star Chamber" is, or when his "assizes" are to be held.

There is no provision for any person affected to know it, to be permitted a hearing, or to be advised what is demanded in respect to his property.

Moreover, there is this monstrosity, the Commissioner may assess on the 1st of May, make his return on the 31st; it may be

received on the 2d of June, and the 20 per cent. penalty be thus incurred, without the possibility of escape.

These vices are all the more amazing when it is pointed out that in Virginia, in every other case of taxing, there exist all the other requisites of due process of law.

If a land owner think himself aggrieved by an excessive assessment, he has two years in which to apply to a Court to reduce an assessment (Va. Code, 1887, sec. 567; which, for the convenience of the Court, is here copied in full):

> "SEC. 567. Redress against erroneous assessment of taxes.—Any person assessed with taxes, aggrieved by an entry in either the land book or the personal property book, may, within two years after the delivery of such book to the treasurer, and any person assessed with a license tax, aggrieved thereby, may, within one year after such assessment, apply for relief to the court in which the Commissioner gave bond and qualified, or to which or to whose clerk such bond and the certificate of his qualification were returned. The Attorney for the Commonwealth shall defend the application; and no order made in favor of the applicant shall have any validity unless it is stated therein that such Attorney did so defend; that the commissioner making the assessment, or his successor, was examined as a witness touching the application; and the facts proved be certified."

In arranging for the assessment of every other variety of personal property (excepting bank stocks) the owner fixes the value himself under oath, and if he and the commissioner of revenue disagree, they submit their differences to arbitration under sections 495 and 496 of the Code. These are here quoted *in extenso:*

> "SEC. 495. With whom form left in absence of taxpayer; to whom returned; if not returned, how list made out.—If any person be absent from his residence at the time the commissioner calls (and there be no one on the premises authorized to act for such person), the commissioner may leave, or cause to be left for such person, at his residence, with some member of the family over the age of sixteen years, or if there be no such person on the premises, may otherwise cause to be delivered to such person proper forms, to enable him to make out the statements aforesaid, verified by affidavit as

hereinbefore required, and deliver the same to the commissioner, or deposit them with the clerk of the county or corporation court, as required by the preceding section. And if any person fail to return the form left with him by the commissioner properly made out, before the making out of his books, the commissioner shall proceed to make out such person's list from the best information he can obtain."

"SEC. 496. Commissioner to assess valuation of property; if taxpayer dissatisfied, matter to be arbitrated.—The commissioner shall, upon his own view, or upon such information as he may obtain or possess, assess a fair cash valuation of all property listed by the taxpayer, as required by the two preceding sections; and where it is practicable the commissioner shall read over the list, with the valuations annexed, to the person from whom such list is obtained, or on whose information it is made out, and it shall be corrected if necessary. If any person consider himself aggrieved by the valuation of the commissioner, such person and the commissioner shall each choose one discreet voter, to whom shall be referred the matters in controversy, and their decision, or that of an umpire chosen by them, shall be final."

This bank-shares tax is not put on a book at all, and is not to be reached under section 567.

In this case, whatsoever else may be said, this proposition is true:

Before the fatal mischief is done, there is no provision in any of the statutes referred to that the shareholder who is despoiled shall have knowledge or notice of what is alleged against him, before what tribunal he may interpose his defense, or when or where the inquisition is to be held. Whatsoever may be contended in this case about notice to the bank, there is no pretence of notice or knowledge brought home to the stockholder.

The notion of "Due Process of Law" is older than Magna Charta, the defiant barons of Runnymede avouching the ancient Saxon laws (Tuck. Const. U. S., 119); but our earliest writing on the subject is the 29th Art. of the Magna Charta, declaring that—

"No freeman shall be taken or imprised or disseized, or be outlawed or exiled, or anywise destroyed, but by the lawful judgment of his peers, or by the law of the land."

This language has in some constitutions and bills of rights been simply reiterated; and in others a succinct expression "due process of law" has been substituted.

They are all equivalents, however.

Palairet's Appeal, 67 Pa. St. 479; 5 Am. R. 450.

In that case the 29th Article of the Magna Charta is declared by Judge Sharswood to be "still the corner-stone of our liberties." *Id.* 453.

To due process of law three things, as matters of constitutional right, are indispensable:

1. A competent tribunal, (not necessarily a court;)
2. Knowledge of what is demanded, and of the time and place of hearing; and
3. An opportunity to defend.

Cooley, Taxation, 266.

Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in the most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.—Stone, J., in *Zeigler* v. *South*, &c., 58 Ala. 594.

Due process of law is wanting where there is no notice of the acts and proceedings that are to bind the party sought to be affected.

Hyland v. *Brazel*, &c., 26 N. E. 672, 674.
Kurtz v. *Sumption*, 117 Ind. 1. (19 N. E. 474).

The Legislative Acts referred to, containing no provision for a hearing of the taxpayer before the fixing of the assessment,

then is void, and the statutory lien sought to be placed on the stock is a cloud upon the title.

Ensign v. *Barse*, 107 N. Y. 329.
Williams v. *Supervisors*, 122 U. S. 154.
Spencer v. *Merchant*, 100 N. Y. 585, 587.
People v. *Turner*, 117 N. Y. 227.
Cromwell v. *McLean*, 123 N. Y. 491.
Thomas v. *Gain*, 35 Mich. 155. (By Cooley, C. J.)

Taxpayer is entitled to an opportunity to be heard.
Hagar v. *Reclamation*, 111 U. S. 701.

Even the Legislature cannot arbitrarily fix *amount* of an assessment.

Matter of Union College, 129 N. Y. 308.
Matter of Flower, 129 N. Y. 643.

If one be illegally deprived of an opportunity to be heard, it cannot be cured by a subsequent statute.

Marsh v. *Chestnut*, 14 Ill. 223.
Billups v. *Ditten*, 15 Ill. 218.
Albany City Nat. Bank v. *Maher*, 9 F. R. 884, 885.

In some jurisdictions invalid assessments are not even a cloud upon the title.

In the leading case of *Stuart* v. *Palmer*, 74 N. Y. 183, it was held that the constitutionality of a statute did not depend on what was done under it, *but on what it provided for or allowed.* The Legislature might, the Court said, prescribe the kind of notice and the mode of giving it; but that *notice* in some form was essential to the validity of any proceedings that affected the rights or property of the citizen.

Earl, J., in *Stuart* v. *Palmer*, *supra.*

But the omission of all provision for notice is fatal:

Boggs v. *Commonwealth*, 76 Va. 989.

In this connexion the Court is referred to the authority of *Violett* v. *Alexandria*, 92 Va. 561, for opinions which follow the

great case of *Stuart* v. *Palmer*, 74 N. Y. 191, in insisting with earnestness upon the indispensable requisites of notice and opportunity to be heard. Cardwell, J., delivering an unanimous opinion, declared that an assessment "without providing for notice to the person whose property was to be affected," thereby "giving such person an opportunity to appear and contest the legality, justice and correctness of the assessment at some stage of the proceedings before the assessment becomes final," is void, and a statute imposing it is in conflict with the 14th Amendment.

The case of *Burroughs* v. *Smith*, 98 Va. 694, in nowise conflicts with the principles stated in *Violett* v. *Alexandria*, *ubi supra*.

In *Heth* v. *Radford*, 96 Va. 272 the Virginia Court of Appeals has put itself again upon record to the effect (1) that assessing is "taxing" property, and (2) that notice and opportunity to contest are indispensable.

See also *Norfolk* v. *Young*, 97 Va. 728. (Use).

"It is manifestly proper that the taxpayers should have notice of the imposition proposed to be laid upon them, and an opportunity for making suggestions and explanations to the proper administrative board of officers." Denio, J., in *Trustees*, &c., 31 N. Y., 574.

Davidson v. *N. O.* 96 U. S. 97.

Touching the case of *Merchants*, &c., v. *Penn'a*, 167 U. S. 461, so relied on by the adversaries, it is to be steadily borne in mind that the distinguishing feature is, that the Statute fixing the time the bank should make its report, *directed the auditor to hear any stockholder who might desire it*, and this, the Court held, was due process of law. Another point is that the Pennsylvania Statute under consideration did not make it imperative upon the bank to pay the tax, but left it optional, merely assessing the shares of the stockholder in case the bank elected not to pay a specified tax. *Id.*, *Ib.* 462.

Welty on Assessments, Sec. 319.

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6.

THE ASSESSMENT IS FINAL.

When the ordinary assessment is made and the tax ticket goes into the hands of the officer to be levied, no power short of the legislature can annul or modify it.

The duties of assessors in estimating the value of property are judicial.

Barhyte v. *Shepherd*, 35 N. Y. 238, 250.
Hassan v. *Rochester*, 67 N. Y. 528, 536.
Stuart v. *Palmer*, 74 N. Y. 183.
Williams v. *Weaver*, 75 N. Y. 30, 33.
Cooley, Tax. 266.
Burroughs, Tax. Sec. 102.
Jordan v. *Hyatt*, 3 Barb. 275, 283.
Ireland v. *Rochester*, 51 N. Y. 416, 430, 431.
State v. *Jersey City*, 24 N. J. L. (4 Zab.) 662, 666.
State v. *Morristown*, 34 N. J. 445.
Griffin v. *Mixon*, 38 Miss. 434, 437, 438.
Hagar v. *Reclamation, &c.*, 111 U. S. 701.
Heth v. *Radford*, 96 Va. 274.

The sole exception is where the assessment is dependent on mere mathematical calculation:

Mayor v. *Colgate*, 12 N. Y. 140.
Western v. *Nolan*, 48 N. Y. 503.
Stuart v. *Palmer*, 74 N. Y. 183.

Assessments are conclusive where the assessor has jurisdiction.

People v. *Campbell*, 148 N. Y. 759; 43 N. E. 177.
Brady v. *Watson*, 64 N. H. 166.
Buffalo v. *Erie*, 48 N. Y. 93, &c., 100 &c., and 105.
Burroughs on Tex. Sec. 102, &c.
People v. *Brooklyn*, 39 N. Y. 81.
People v. *Albany*, 40 N. Y. 155.

In the language of Leonard, C., in *Buffalo* v. *Erie*, 48 N. Y. 99, "the assessors are quasi judicial officers, and the assessment

valid when finally completed by the supervisors of the County stands as a judgment."

Fixing value is a judicial act and final.

Burroughs on Tax. Sec. 103 (p. 244).
Albany, &c., v. *Canaan*, 16 Barb. 244, 248.
Van Rensselaer v. *Cottrell*, 7 Barb. 127.
Barhyte v. *Shepherd*, 35 N. Y. 238.
Swift v. *Poughkeepsie*, 37 N. Y. 511.
Stanley v. *Albany*, 121 U. S. 535, 550.

In this last case Mr. Justice Field, referring to assessors, uses this language, "Their action is judicial in its character. They pass judgment on the value of the property, upon personal examination and evidence respecting it. Their action being judicial their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment."

It is preposterous for any one to suggest that the shareholders will have an opportunity to contest when the Attorney General brings a suit years after the assessment under the Acts of March 3rd, 1896, Acts 1895–6, p. 700, or p. 726. He may never hear of the matter until he is impleaded. Then the only defences are payment, and, *nul tiel record*.

All assessments in Virginia, except this obnoxious effort, are made by and with the taxpayer and assessor. A form is handed to the taxpayer for him to fill up, and if it be not satisfactory, he and the assessor may fight it out with the fullest notice and opportunity to contest. Code Secs. 567, 496.

Under this statute the taxpayer never hears of the assessment until he is impleaded.

Whatever may be the decisions in the other States, this is a Virginia Statute, and the views of the Supreme Court of Virginia are conclusive in giving the principles which prevail in the State in regard to the necessity of notice and the form thereof and the opportunity for a hearing.

7.

NOTICE INDISPENSABLE.

If the law fail to provide that the taxpayer shall have notice of the time and place of the proceedings by which he is to be deprived of his property, it is fatally defective.

Cooley, Taxation, 266. (Use).

Lander v. *Mercantile Bank*, 186 U. S. 458, 468. (Quote "We agree" &c.)

Scott v. *Toledo*, 36 F. R. 385, 397.

Stuart v. *Palmer*, 74 N. Y. 191.

Violett v. *Alexandria*, 92 Va. 561.

Heth v. *Radford*, 96 Va. 272.

Overing v. *Forte*, 65 N. Y. 263.

Remsen v. *Wheeler*, 105 N. Y. 573, 579.

Sante Clara v. *Southern P. R.*, 18 F. 410. (Use).

San Mateo v. *Southern P. R.*, 13 F. 722. (Use).

Notice is a jurisdictional matter.

Garner v. *Wells*, 3 N. E. 846, 849.

Hobbs v. *Board*, 3 N. E. 263, 265, &c.

Wells v. *Graver*, 17 N. E. 290, 291.

Recognizing the principle, or its equivalent, see—

Pittsburg, &c., v. *Board*, 172 U. S. 32, 45. (Use).

Its absence from the Statutory provisions will make void any proceedings had under them.

Campbell v. *Dwiggins*, 83 Ind. 483.

Tyler v. *State*, 83 Ind. 563.

In these cases, sections 4282 and 4307 of the Indiana Statute which sought to allow trustees to keep drains in repair and to assess the expense against lands benefited thereby according to their judgment, without notice to, and a hearing, or opportunity to be heard, on the part of the owner, were declared unconstitutional as authorizing a caption without due process of law.

McLaughlin v. *Miller*, 124 N. Y. 510, 517.

This case affirms *Stuart* v. *Palmer*, 74 N. Y. 103, and *Remsen* v. *Wheeler*, 105 N. Y. 573, and points out in reference to *Hagar* v. *Reclamation District, ubi supra*, that the assessment could only be enforced by such proceedings. "But," continues Judge Bradley (of the New York Court), "Mr. Justice Field in that case referred to cases where no notice is necessary, and they are those specifically fixed by law, such as the tax on animals of a fixed sum per head, or on such articles of a fixed sum per yard, or bushel, or gallon, and to taxes in the form of license to do business of a particular kind, or at a particular place."

It is admittedly absurd to cavil about "notice" and "due process of law" where one wants a license to practice medicine, to keep an ordinary, &c. If notice could be of any service, he has it in advance, and it is a parcel of his mental stock when framing his judgment as to whether he will, or will not, pay the tax and accept the privilege.

The cases in which notice is obviated are those in which the party to pay the tax moves.

On the other hand, in all those cases in which the sovereign takes the initiative, assumes the role of a plaintiff, as it were, the indispensability of notice to the party attacked, the defendant, so to speak, is denied in no well-considered case.

The case under argument has none of the redeeming features such as are conspicuous in those in which this Court has sustained the validity of the tax on bank shares.

Here there is an unjust discrimination, and a taking of property without warrant of authority.

This Court is asked to reverse the decree complained of, and to enter an order overruling the demurrer, and perpetuating the injunction.

Respectfully,

JOHN H. LEWIS,

(With whom are WILSON & MANSON and BLACKFORD, HORSLEY & BLACKFORD.)

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Supreme Court of the United States.

THE PEOPLES NATIONAL BANK OF LYNCHBURG,
APPELLANT,

v.

MORTON MARYE, AUDITOR OF PUBLIC ACCOUNTS
OF THE STATE OF VIRGINIA.

Reply Note for Appellant on Demurrer.

Supreme Court of the United States.

THE PEOPLES NATIONAL BANK OF LYNCHBURG,
APPELLANT,
v.
MORTON MARYE, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF VIRGINIA.

Reply Note for Appellant on Demurrer.

There is little, if anything, in the written argument of the distinguished Attorney-General of Virginia which has not been dealt with in our opening brief. As the court has not the familiarity with the record, which counsel of necessity must have, we will briefly refer to the different pages of the record for the convenience of the court.

The original bill filed July 22, 1896, will be found from pages 1 to 11 of the record. We would suggest that the court would be facilitated by considering together the original bill, the first amended bill on pages 15 and 16 of the record, not including the exhibits and the second amended and supplemental bill on pages 23 and 30 of the record, which together with the exhibits filed with the bill and amendments, constitute the plaintiff's bill, and all the facts alleged therein are admitted by the defendant's demurrers.

On pages 17 to 21 and 68 to 69 will be found the tabulated statements from the official reports of the Auditor of Public Accounts of Virginia, made in pursuance of the statute law, showing in detail each class of personal property in Virginia and so segregating, as will appear from the headings, as to make it clearly appear the class of property and the total amount in value for the respective years viz.: from 1891 to 1897 inclusive.

The court will observe that all the cities and counties of the

state are omitted in the printing, except the city of Lnychburg, which is done in pursuance of the stipulation found on page 101 of the record.

On pages 31 to 65 both inclusive will be found for the years 1891 to 1897 inclusive a list of the stockholders of the appellant, with details of amount of stock held by each, with the assessed values for the different years respectively, and the amount that each of the stockholders is entitled to deduct from the assessed value of his stock, being the balance of indebtedness due by each stockholder not deducted from anything else, as appears from the affidavit on page 29 of the record, and allegation of the second amended and supplemental bill.

On page 67 of the record will be found a statement to be given by a person owning personal property in the State of Virginia, except shareholders in banks.

On page 23 of the record will be found the amount of real estate according to assessment, owned for the different years from 1891 to 1897 inclusive by the Peoples National Bank of Lynchburg.

On pages 70 to 76 inclusive will be found the schedule made in his official capacity, by the Auditor of Public Accounts, of the amount of the assessed value of the shares of stock in all incorporated banks in Virginia, and stars, indicating which of them for the respective years did not pay the state tax, and it also appears from the note at the foot of each of these statements, until the bill in this case was filed, that the Auditor of Public Accounts had directed the Attorney-General to sue. This is alleged in the bill of the appellant and verified by the statement of the Auditor of Public Accounts in his official report, and the Auditor of Public Accounts has full authority under the statute of Virginia to direct the institution of suits, as will appear from sections 681, 682, 683 and 684 of the Code of Virginia of 1887, which are as follows:

Code of Virginia, 1887, sec. 681.

> *Auditor to institute proceedings.*—The Auditor of Public Accounts shall institute and prosecute all proceed-

ings proper to enforce payment of money to the Commonwealth.

Sec. 682. *In what court; the proceedings.*—The proceeding may be in the Circuit Court of the city of Richmond. When it is at law, it may be by action or motion.

Sec. 683. *In what name; when not to abate.*—Any such action shall be in the name of the commonwealth of Virginia, except where it is on a bond payable to, or a contract made with, the Governor or some other person. And then it may be in the name of such Governor or other person for the use of the commonwealth, notwithstanding such Governor or other person may have died, resigned, or been removed from office before the commencement of the action. And there shall be no abatement thereof by reason of the death, resignation, or removal from office of any such plaintiff pending the action.

Sec. 684. *Motion, against whom made; notice required.*—Any such motion may be made, after fifteen days' notice, against any person indebted or liable to the commonwealth in any way whatever, and against his sureties, and against his and their personal representatives. And it may be made where the debt or liability is created or secured by a bond or other instrument, whether the same be payable to the commonwealth or to any person acting in a public character on behalf of the commonwealth, or be for the payment of money or the performance of other duties. Every judgment on any such motion shall be in the name of the commonwealth.

So, the learned Attorney General is under a misapprehension in suggesting that it was never the intention of the State to pursue the appellant, as will be seen from the allegations of the bill, pages 4 and 6.

The demurrer of the Auditor of Public Accounts will be found on pages 15 and 16 and 77 of the record.

The different stipulations between the parties will be found on pages 15, 16, 78, 79 and 101 of the record.

The learned Attorney General is under another misapprehension in saying, "even if every contention of the appellant should be sustained, the State has been deprived of a very large amount of revenue, to which it is entitled." If either of the constitu-

tional questions involved should be decided in favor of the appellant, there can be no recovery for the State, and for every stockholder it is claimed that there should be a deduction of the assessed value of the real estate from the value of the stock.

It has been with deep regret that the appellant has been compelled to enter into this controversy, as at the very beginning it was proposed to the State to waive all constitutional questions if the shareholders of the bank were justly dealt with and deduction was allowed of the real estate from the valuation of the stock; notice given to the stockholders of the valuation; and those who owed debts were allowed to deduct them when they had nothing else from which to deduct, but this was refused and the banks have been put to great cost and expense in litigating these matters and the delay has not been the fault of the appellant.

The learned Attorney General falls into another error on page 4 of his brief in stating that sec. 17, imposing a tax on the bank, in no sense makes the bank responsible in any way for failing to pay the tax. He had simply to read the case of the *National Bank* v. *Commonwealth*, 9 Wallace, 353, construing the Kentucky statute, which was almost identical with sec. 17. It not only created a liability on the bank to pay, as was decided in the above case, but imposed a penalty of 20 per cent. on the amount of taxes which had been assessed against each stockholder on the cashier of the bank and his sureties. If the learned Attorney General supposes that such a penalty upon the cashier of the bank and his sureties was not onerous to the bank and that the bank was not concerned in the payment of the whole tax under the above decision, he is in very great error. The bank would soon be without a cashier, if he was liable to such penalties and he would be without power to contest the assessments or anything, in fact, but the correctness of the amount of taxes, viz.: the calculations of the amount of taxes from each stockholder and the addition of the same. *Hefferman's Adm'r* v. *Gryner's Adm'r*, 2 Leigh 521. This case very clearly states the doctrine that a garnishee does not and cannot represent the

alleged debtor, but can only defend as far as his interest goes, viz., does he, the garnishee, owe the alleged debtor and, if so, how much?

We do not appreciate the point made on page 5 of his brief in reference to the effect of a part of the act being constitutional and the other part unconstitutional. The doctrine is a well settled one, but we do not appreciate its application to this case.

We do not think it had ever occurred to any one but the distinguished Attorney-General that Act No. 1 of 1896, was a repeal of sec. 17 of Act of 1890. The only possible effect of Act No. 1 of 1896, upon sec. 17 of the Acts of 1890, was to hold out an inducement to the bank to pay by July 1st of that year, and relieve itself and its cashier and his sureties of the 20 per cent. penalty on the taxes for 1891-'95 inclusive. Further than this sec. 17 of the Act of 1890 was unaffected. Act No. 1 of 1896, gave additional remedies for the enforcement of the taxes, which had been assessed and fixed.

The Attorney-General is under a misapprehension as to the fairness and justness of the taxation of shares of stock in banks. On page 32 of his brief he made the statement practically, that the capital of corporations in Virginia is taxed, embracing its real estate, and shares of stock of the same corporation are also taxed. The statute of Virginia provides, "he (Commissioner of Revenue) should ascertain the value of all capital of incorporated, joint stock companies, not otherwise taxed, but real estate belonging to such companies shall not be held to be capital, but shall be listed and taxed as property and not as capital." In other words, if there is a joint stock company of $100,000.00 capital and $50,000.00 of this has been invested in real estate, then the Commissioner of the Revenue only ascertains the capital to be $50,000.00, the balance being invested in real estate is taxed as such. The real estate may be assessed at $10,000.00, but only $50,000.00 of capital is to be taxed. See page 201, Acts 1889-90.

Our learned friend is mistaken in supposing that the shares of stock in corporations were taxed. As a practical question they

never were except for a short time. There was no statute providing for it until the Act of January 20th, 1898, Acts 1897-8, page 386, when sec. 8 of Schedule "C" was amended so as to insert stocks along with bonds, notes and other evidences of debt. There went up over the commonwealth of Virginia such a storm of criticism that in the next legislature the law was changed, Acts 1899-1900, page 1004:

> *Third.* He shall ascertain the value of all capital of incorporated joint stock companies not otherwise taxed, and when such capital is taxed by the state of Virginia, the shares of stock in the hands of individual shareholders shall not be further taxed for state purposes; but real estate belonging to such company shall not be held to be capital but shall be listed and taxed as property, and not as capital.

The decision of the Court of Appeals in the cases of *Allen* v. *Commonwealth* and *Jennings* v. *Same,* 98 Virginia, 80, was based on the Act as amended, but on the 6th day of March, 1900, six days after this decision, the law was changed as above stated, and, as we have stated, shares of stock was first inserted in sec. 8 of Schedule "C" by the Act of February 14th, 1898.

The learned Attorney-General is under a misapprehension with reference to what is embraced under sec. 8 of Schedule "C" in the tax law of Virginia. Schedule "D" on page 56 of his brief, which is also contained on page 67 of the record, shows that much which is suggested by him as embraced under sec. 8 Schedule "C," is embraced under Schedule "D," and taxed as income, and this view is borne out by the decision of our Court of Appeals in the case of *Willis* v. *Commonwealth,* 97 Virginia, page 672, where the court states that the taxes on ground rent in form of income are paid as it is received, but Schedule "D" embraces all salaries, etc., under the head of income.

This is not a case, as the learned Attorney-General seems to think, where so much of the tax as was due after the deduction for indebtedness of stockholders should be paid, and the balance contested. The deduction of indebtedness of stockholders from the valuation of the shares of stock is only one of the questions in this case. The whole tax is contested, and the right to collect

is denied, on the constitutional grounds discussed in our opening brief.

The case of *Hills* v. *Exchange Bank*, 105 U. S. 319, covers the question of jurisdiction of a court of equity, the court there distinctly stating that this is a settled question. It says, "several questions are raised, or rather sugested, which we think have heretofore been decided by this court, such as the right of the Bank to maintain a suit on behalf of its shareholders. This was established by the cases of *Cummings* v. *National Bank*, 101 U. S. 153, and *Pelton* v. *National Bank*, *id.* 143."

Proceeding in equity by the Bank was also maintained in the case of *Evansville Bank* v. *Britton*, 105, U. S. 322. In fact, it has been sustained in so many instances that we did not suppose that it was now an open question.

But there is an additional ground for equity jurisdiction, viz., under Act No. 1 of 1896, there is a lien created on all shares of stock for unpaid taxes, and under Act No. 2 of 1896, there is a lien on shares of stock and the Bank is required to hold all dividends or other funds which belong to the stockholders and is in its custody at the time the assessment list is received, or that thereafter shall come under its control, for the use of the commonwealth and apply the same to the payment of the tax assessed. Not only the stockholders, but the bank, are put in uncertain position with impending liabilities by reason of these liens. See *Union Pacific Railway Co.* v. *Cheyenne*, 113 U. S. 516. In this case on page 526 the court says: "In *Cummings* v. *National Bank*, 101 U. S. 153, 156, where the bank filed a bill to prevent the collection of a tax wrongfully assessed by the State against the shares of its stockholders, and which the Bank was required to pay, we held that the fiduciary character in which the bank stood to its stockholders entitled it to come into a court of equity for relief. In the same case, the fact that a like remedy by injunction was given to parties in the State court was regarded as entitled to much weight; and it was further held that where a rule or system of valuation was adopted by the State Board of Assessment, calculated to operate unequally, and to violate the

Constitution of the State, and applicable to a large class of individuals, or corporations, equity might properly interfere to restrain the operation of such unconstitutional exercise of power. And in *Litchfield* v. *Webster County*, 101 U. S. 773, 779, we held that a court of equity might relieve against an excessive rate of interest on taxes in arrear, which was really in the nature of a penalty, and which the state could not fairly and equitably demand, having itself claimed title to the property taxed."

We again call the court's attention to the fact that in Virginia there is no remedy for a stockholder in a National Bank provided by statute, and more than this, there is a remedy provided for other property holders under secs. 567-8-9-70 and 71 of the Code of Virginia, but, if the stockholder in a National Bank pays his tax he can never get it back, no matter how illegal or unconstitutional. See also *Lander* v. *Mercantile Bank*, 186 U. S. 458.

Under rulings of this court it is not necessary to make the shareholders parties, but only necessary to set out the names of the shareholders, who are entitled to deduction of indebtedness, with the amount they are entitled to deduct.

See *Lander* v. *Mercantile Bank*, 186 U. S. 472 and *Hills* v. *Exchange Bank*, 105 U. S. 320, and *Evansville Bank* v. *Britton*, 105 U. S. 322.

This we have done. The name of every shareholder from and including the year 1891, to and including the year 1897, is set out, also the number of shares of stock that he owns, the par value of each share, the market value of each share, as assessed by the commissioner, the aggregate market value of the shares of each stock holder and the deduction he is entitled to. The assessed value of the real estate of the bank for each of said years as set out in the second amended and supplemental bill on page 23 of the record, is a mere matter of calculation as to the amount to be deducted, because the real estate of the bank is included in the valuation of the shares of stock. The exhibit from pages 31 to 65 inclusive is made a part of the bill and is to be read as a part thereof, as though set out in full on its face.

The exhibits are made parts of the bill and the demurrer ad-

mits all of the allegations of the bill, which include, of course, the amended and supplemental bill.

See also *Whitbeck* v. *Mercantile Bank*, 127 U. S. 199-200.

If the Bank cannot maintain this suit in equity, who can? This court held, in the case of *Dows* v. *City of Chicago*, 11th Wallace, 108, that the individual stockholder cannot maintain it. If neither the individual stockholder can maintain such a bill, nor the Bank, what remedy is there for an unconstitutional assessment, which will be held void, if the parties can get into court, what remedy for an assessment in contravention of the United States statute, permitting a tax to be imposed on the shares of a National Bank.

There is no way of preventing a multiplicity of suits that we can conceive of, except a bill in equity, by the Bank. Suppose this bill is dismissed on the ground that the Bank could not maintain this suit, then the numbers of actions at law will amount to several hundred. See the list of stockholders, who change, to some extent, from year to year, pages 31-65, inclusive, of the record. A separate proceeding against or by each stockholder, and in each one the identical same question to be raised, except that the question of deduction of debts would not arise as to those who had no debts to deduct, but the question of the deduction of the real estate from the valuation of stock applies to every stockholder; the question of due process of law applies to every stockholder, and the question of the constitutionality of the Act of 1890, under the Virginia Constitution applies to each stockholder.

This case is stronger than the case of the *Mercantile Bank* v. *New York*, 121 New York, 138. The New York statute did not make the tax a lien, nor was there any provision for the Bank or its cashier paying the tax.

In Virginia, the remedy in equity by injunction, where there is alleged illegal tax, has long ago been sanctioned by our highest court. See *Bull & als.* v. *Read & als.*, 13 Gratt., opinion of Lee, J., beginning on page 86, where the doctrine is settled in

Virginia, that the taxpayer's appropriate remedy is by bill in equity and an injunction. The court says:

> "Nor is the jurisdiction of the court of equity in such a case more difficult to be maintained. It may be that for each act of the board of commissioners affecting the inhabitants of the district, every one who is aggrieved might have a remedy at law of some sort, more or less effectual, but the remedy in equity would be far more perfect, adequate and complete, and as the acts of the commissioners would be in their nature continuing and to be renewed from time to time, to restrict the parties to their legal remedies would be to consign them to interminable litigation and involve endless multiplicity of suits. Hence the court of chancery will interpose by its injunction to prevent the threatened wrong and provide a remedy which shall at once reach the whole mischief and secure the rights of all, both for the present and the future; and its jurisdiction in such cases would seem to be well defined and fully sustained by authority."

See *City of Richmond* v. *Crenshaw & Als.*, 76 Virginia, 936, Head Note, "*Taxation*—Remedy against illegal.—By a long course of decisions it has been settled that the remedy against the attempt to coerce the payment of an illegal tax is by injunction."

City of Richmond v. *Richmond & Danville R. R. Co.*, 21 Gratt. 604.

Town of Danville v. *Shelton & Als.*, 76 Virginia, 325.

Redd & Als. v. *Supervisors of Henry County*, 31 Gratt. 695.

Johnson & Als. v. *Drummond, &c.*, bill to enjoin tax imposed by the State of Virginia, held equity had jurisdiction, 20 Gratt. 419.

The case of *Violett* v. *Alexandria*, 92 Virginia, 561, very strikingly illustrates the view of the Supreme Court of Virginia. In this case, the bill was filed to enforce the assessment made against property-holders, and the court held, practically, that under the system of assessment, and ascertaining the values in Virginia (there being no general law for the ascertainment of value in a suit against taxpayer), when the assessment is made

without a provision for notice to the taxpayer of the assessment, it is illegal and void.

We do not mean that the court used this language, but this is the only logical deduction from the case, which is a full and interesting discussion of the question. It has become a settled principle with this court, that where either a statute or practice of the Supreme Court of a state permitted a resort to a court of equity, to follow this rule or statute in the United States Courts.

That proceeding by injunction in equity is the proper proceeding for the taxpayer, appears from the case of *Norfolk* v. *Young,* 97 Virginia 728, in which case the court approves *Violet* v. *City of Alexandria,* 92 Virginia 561, and holds that the assessment was void because there was no proper notice to the property owner of the proceedings to impose the assessment upon him. This was a suit in equity by the taxpayer and an injunction, and again illustrates the doctrine that in Virginia assessments are a finality, a judicial ascertainment of value, and there must be notice before this ascertainment. The court expressly in this case approves the opinion of Mr. Justice Field in the case quoted by us in our opening brief of the *County of Santa Clara* v. *Southern Pacific Railway Company,* 18 Federal Reporter 410.

MANDAMUS.

In response to the suggestion of the Attorney-General that the remedy by mandamus would be available, it is sufficient to cite the declaration of this Court in *Allen, Auditor,* v. *B. & O. R. R. Co.,* 114 U. S. 311:

> "The remedy to restrain by injunction taxes levied upon railroads, in alleged violation of a contract with the State, was administered in *Tomlinson* v. *Branch,* 15 Wall., 460, and in numerous other similar cases, where it has been denied, the jurisdiction to grant the relief if the facts warranted it has been assumed without question. And see *Litchfield* v. *Webster Co.,* 101 U. S. 773.
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> In the case of national banks, the assessment and collection of taxes illegally assessed under the authority of state laws, in violation of Acts of Congress, are habitually re-

strained by the preventive remedy of injunction; and the jurisdiction of the Courts of the United States in those cases is regarded as in the highest degree beneficial and necessary to prevent the agencies of the Government of the United States from being hindered and embarrassed in the performance of their functions by state legislation. The exercise of that jurisdiction, and by means of that remedy, in such cases is to vindicate the supremacy of the Constitution, and to maintain the integrity of the powers and rights which it confers and secures; and that jurisdiction is vested in the Courts of the United States because the cases embraced in it are necessarily cases arising under the Constitution and laws of the United States."

A Cloud on the Title; Ground of Jurisdiction.

"This expression" Cloud on Title, used chiefly in equity jurisprudence, designates some instrument or proceeding, some dead mortgage, judgment, decree, assessment, tax, or the like, which to be valid impairs the title of a party to real estate, but which upon extrinsic facts, is void, and ought equitably to be annulled or removed."

Abbot's L. Dic. 235.

This is correct except that the same applies equally to personal estate.

Sherman v. *Fitch,* 98 Mass. 59.

The cloud in that case was upon the title to personal property. So in the case of spurious issuing of stock.

N. Y. v. *Schuyler,* 17 N. Y. 592.

Springport v. *Teutonic, &c.,* 75 N. Y. 397.

In U. P. &c., v. *Cheyenne,* 113 U. S. 516, in a discussion of the priciple on which a cloud upon a title calls for equitable interference the court remarking that "even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief.

In conclusion, we wish to insist that there has never been a day when the stockholders of this bank were unwilling to pay

their proper proportion of taxes for the support of the government. Had the Attorney-General consulted the auditor's reports, he would have found that the people of Lynchburg paid more taxes on personal property than the three largest cities in this state, combined, excluding Richmond. Then he would have no doubt concluded that his reflections on the stockholders in that connection were gratuitous. But the stockholders of this bank are jealous of their rights and liberties under the constitution and laws of the United States.

They believe with Alexander Hamilton that "whatever liberty a man may boast of in theory, cannot exist in fact while arbitrary assessments continue." That the assessment of the bank shares in this case was arbitrary in the extreme is tacitly admitted by the Attorney-General.

They believe with Chief Justice Marshall that "the power to tax is the power to destroy." They believe with Mr. Wells, in his treaty on taxation, that "the absence or existence of limitations on the power of a government to make compulsory levies on the property or persons of its people for its use or support, constitutes the dividing line between a despotism and a free government."

Now in as much as the Constitution of the United States and the Acts of Congress have undertaken to put limitations upon this power to destroy, and have placed the people on the safe side of this dividing line between "despotism and a free government," we ask the protection to the property of our people according to the decisions of this court for the past twenty-five years, and feel that we ask not in vain.

Respectfully,

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J. D. HORSLEY,
For Appellant.